TAB 8

objected to the Court of Appeal's awarding damages, no compelling reasons were given as to why the award was too high or otherwise not appropriate in these circumstances. It is not without precedent for this Court to affirm a damage award made in the first instance by a Court of Appeal: see *Bellechasse Hospital Corp. v. Pilotte*, [1975] 2 S.C.R. 454, 56 D.L.R. (3d) 702.

[68] Similarly, in *Reaney v. Co-op. Wholesale Soc. Ltd.*, [1932] W.N. 78, the English Court of Appeal assessed damages in the first instance upon the appeal of a wrongful death case, again for the sake of avoiding an unproductive delay which would have wrought more injustice than benefit. Section 46.1 of the *Supreme Court Act*, R.S.C. 1985, c. S-26, provides that:

> 46.1 The Court may, in its discretion, remand any appeal or any part of an appeal to the court appealed from or the court of original jurisdiction and order any further proceedings that would be just in the circumstances.

The respondent was terminated more than nine years ago, any further delays are not in the interests of justice and the case ought to be concluded. In all the circumstances, the damages assessed by the Court of Appeal are reasonable, and fairly compensate the respondent's loss. The record does not support the awarding of any other damages; accordingly, the order of the Newfoundland Court of Appeal is affirmed.

IV. DISPOSITION

[69] Accordingly, the appeal is dismissed. The respondent shall have his costs in this Court and throughout.

Appeal dismissed.

Winters v. Legal Services Society et al.

[Indexed as: Winters v. British Columbia (Legal Services Society)]

Court File No. 26180

Supreme Court of Canada
Lamer C.J.C., L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci, Major, Bastarache and Binnie JJ.

Heard: December 3, 1998
Judgment rendered: September 15, 1999

Criminal law — Prisons — Inmates' rights — Pursuant to Legal Services Society Act, publicly funded legal services must be provided to qualifying

individual who may be imprisoned or confined through civil proceedings — Inmate charged with serious disciplinary offence who could face up to 30 days in solitary confinement thus entitled to legal services — However, Legal Services Society having discretion to decide whether legal services funded will include legal representation at hearing, based on criteria of what reasonable person of average means would expect — Legal Services Society Act, R.S.B.C. 1979, c. 227, s. 3 — Corrections and Conditional Release Act, S.C. 1992, c. 20, ss. 38, 40, 44.

Criminal law — Costs — Awards of solicitor-client costs unusual —Nothing in case or in behaviour of losing party warranting award of solicitor-client costs — Costs awarded on party and party basis only.

An inmate, serving a life sentence for first degree murder, was charged with assaulting another person, contrary to the provisions of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20. As a result of an administrative procedure by prison staff, the disciplinary court was to be chaired by an independent chairperson having the power to impose solitary confinement. Concerned that he was facing the prospect of solitary confinement and that a conviction for the offence could be used as evidence against him at his parole eligibility hearing under s. 745.6 of the *Criminal Code*, the inmate requested that he be represented by counsel. Although the inmate was financially eligible to have counsel appointed to act on his behalf, the Legal Services Society took the position that prison disciplinary hearings were not covered by the *Legal Services Society Act*, R.S.B.C. 1979, c. 227. Section 3(1)(*a*) of the *Legal Services Society Act* provided that an object of the Society was to ensure that "services ordinarily provided by a lawyer are afforded to individuals who would not otherwise receive them because of financial or other reasons". The relevant parts of s. 3(2) of the Act provided that the Society shall ensure, for the purposes of s. 3(1)(*a*) of the Act, "that legal services are available for a qualifying individual who (*a*) is a defendant in criminal proceedings that could lead to his imprisonment;" or "(*b*) may be imprisoned or confined through civil proceedings". The inmate's petition before the Supreme Court of British Columbia for a declaration that the Legal Services Society was required to provide him with legal representation at the hearing, and that the Society was required to make legal services available to him for his defence was dismissed, as was the inmate's appeal to the British Columbia Court of Appeal.

On further appeal by the inmate to the Supreme Court of Canada, **held**, Cory J. dissenting in part, the appeal should be allowed and the matter remitted to the Legal Services Society of British Columbia.

Per Binnie J., Lamer C.J.C., L'Heureux-Dubé, Gonthier, McLachlin, Iacobucci, Major and Bastarache JJ. concurring: The reasons of Cory J. were agreed with except with respect to his conclusion that the inmate had a statutory right to representation by publicly funded counsel at the prison disciplinary hearing. Prison disciplinary proceedings can result in up to 30 days' solitary confinement, and up to 45 days in the case of multiple convictions, and, for the reasons given by Cory J., this brought the inmate within the entitlement to mandatory legal services provided under s. 3(2) of the *Legal Services Society Act*. However, the Act does not define

the content of the legal services that the Society has a duty to make available. The term "legal services" is used in a very broad sense to include services rendered not only by lawyers or articling students but by individuals who are not lawyers at all, provided they are supervised by a lawyer. The term is not synonymous with legal representation and the Act nowhere specifies a right to publicly funded legal counsel at a trial or hearing. The Society has a discretion to determine when mandatory legal services under s. 3(2) ought to rise to the level of legal representation.

In making its decision, the Society must consider all of the relevant circumstances, including the nature of the charge, the procedure for its determination, the severity of the punishment of the applicant if convicted, and other potential indirect consequences such as loss of remission, or prejudice to a potential transfer to a lesser institution. The Society correctly recognized that the services ordinarily provided by a lawyer to a client include an assessment of the cost effectiveness of varying levels of service. The Society had recognized this reality of lawyer-client relationships in its working definition of the appropriate level of legal services, by aiming to provide legal services "at least equivalent to that which a reasonable person of average means would expect to receive from a properly instructed competent member of the legal profession". This would not necessarily amount to legal representation at the hearing, although it might very well do so. When legal representation at the hearing is that which a reasonable person of average means expects to receive, the Society is under a statutory duty to provide counsel at the hearing. Although ordinarily the prospect of solitary confinement would persuade a reasonable person of average means to have counsel at the hearing, the task of the Legal Services Society was complicated by the fact that solitary confinement is theoretically available for a vast range of offences under the *Corrections and Conditional Release Act*, yet may or may not be even a remote possibility in a particular case such that the intention could not be attributed to the Legislature of British Columbia to mandate legal representation for everything which Parliament, through the *Corrections and Conditional Release Act*, chose to designate as an offence carrying the potential of solitary confinement.

There were no particulars about the nature or gravity of the assault alleged against the inmate. In these circumstances, services ordinarily provided by a lawyer would include a preliminary investigation of the facts giving rise to the disciplinary charges, and advice about the range of potential outcomes and the chances of success. It might be expected that in many cases the best advice would be to have a lawyer at the hearing. The prospect of solitary confinement, if a plausible risk in the circumstances, would argue for such an outcome. However, in some circumstances, the best advice might be that there is no useful role for a lawyer. The facts may not be in dispute. It may be apparent that solitary confinement, while theoretically available, is not a realistic possibility and that legal counsel at the hearing is unnecessary. The Society should not be required to provide more than a reasonable person of average means would provide for himself or herself.

Per Cory J. dissenting in part: To qualify for legal services under either s. 3(2)(*a*) or s. 3(2)(*b*) of the *Legal Services Society Act* an applicant must meet a two-part test. First, the proceedings must be either criminal or civil in nature. Second, the

proceedings, if criminal, must possibly lead to imprisonment and, if civil, to imprisonment or confinement. Both the nature and the consequences of the proceedings are thus relevant.

This court had previously held that prison disciplinary hearings are not criminal proceedings. As both branches of the test under s. 3(2)(*a*) of the Act must be met, and the inmate failed the first, the nature of the proceedings, there was no reason to consider the consequences of the proceedings in terms of whether the imposition of solitary confinement constituted imprisonment.

With respect to whether prison disciplinary proceedings that may result in solitary confinement come within the term "civil proceedings" in s. 3(2)(*b*) of the Act, the outcome of a prison disciplinary hearing could result in the imposition of a term of solitary confinement such that a prisoner's private rights can be and are affected by a prison disciplinary hearing. Solitary confinement as punishment can be imposed only after a quasi-judicial proceeding and can thus be distinguished from solitary confinement intended simply to preserve order in the institution or for the welfare of the inmate. A prison disciplinary hearing is thus a civil proceeding within the definition of s. 3(2)(*b*) of the Act. The consequences and effects of solitary confinement on prisoners demonstrate that it is not simply an alternative type of incarceration. Rather, it is a further deprivation of a prisoner's residual liberty interests.

The second part of the test required the inmate to show that he "may be imprisoned or confined" as a result of the prison disciplinary hearing. By inference, if solitary confinement is not a true penal consequence, it cannot be equated with imprisonment that is separate and different from the incarceration already experienced by an inmate. The remaining question was whether solitary confinement was "confinement" within the meaning of s. 3(2)(*b*) of the Act. Segregation, whether administrative or punitive, is a form of incarceration more restrictive than the incarceration experienced by the general prison population. It results in a deprivation of the prisoner's residual liberty interest and represents a further confinement of the inmate in a prison within a prison. It therefore constituted "confinement" within the meaning of the Act.

Solitary confinement has a significant and deleterious effect upon prisoners. Because of the possible effects and consequences of solitary confinement, a fair hearing is required. Fairness requires that the prisoner be provided with legal counsel.

Solicitor-client costs are unusual. There was nothing in this case or in the behaviour of the Legal Services Society or the Attorney General of British Columbia which would warrant an award of solicitor-client costs.

Cases referred to

By Binnie J.

Gonzalez-Davi v. British Columbia (Legal Services Society) (1991), 81 D.L.R. (4th) 12, [1991] 5 W.W.R. 181, 55 B.C.L.R. (2d) 236, 26 A.C.W.S. (3d) 420 — **refd to**

Landry v. Legal Services Society (1986), 28 C.C.C. (3d) 138, [1986] 4 W.W.R. 645, 3 B.C.L.R. (2d) 98, 16 W.C.B. 454 — **overd**

Martineau v. Matsqui Institution (Disciplinary Board) (1979), 50 C.C.C. (2d) 353, 106 D.L.R. (3d) 385, [1980] 1 S.C.R. 602, 13 C.R. (3d) 1 (eng), 15 C.R. (3d) 315 (fr), 30 N.R. 119, 4 W.C.B. 178 — **refd to**

Mountain v. Legal Service Society (1983), 9 C.C.C. (3d) 300, 5 D.L.R. (4th) 170, [1984] 2 W.W.R. 438 — **refd to**

R. v. Rowbotham (1988), 41 C.C.C. (3d) 1, 35 C.R.R. 207, 63 C.R. (3d) 113, 4 W.C.B. (2d) 30, 25 O.A.C. 321 — **distd**

By Cory J. (dissenting in part)

Cardinal v. Kent Institution (Director) (1985), 23 C.C.C. (3d) 118, 24 D.L.R. (4th) 44, [1985] 2 S.C.R. 643, 49 C.R. (3d) 35, [1986] 1 W.W.R. 577, 69 B.C.L.R. 254, 63 N.R. 353 — **refd to**

Friends of the Oldman River Society v. Canada (Minister of Transport) (1992), 88 D.L.R. (4th) 1, [1992] 1 S.C.R. 3, 3 Admin. L.R. (2d) 1, 7 C.E.L.R. (N.S.) 1, [1992] 2 W.W.R. 193, 84 Alta. L.R. (2d) 129, 132 N.R. 321, 48 F.T.R. 160*n*, 31 A.C.W.S. (3d) 250 — **refd to**

Gonzalez-Davi v. British Columbia (Legal Services Society) (1991), 81 D.L.R. (4th) 12, [1991] 5 W.W.R. 181, 55 B.C.L.R. (2d) 236, 26 A.C.W.S. (3d) 420 — **refd to**

Howard v. Stony Mountain Institution Inmate Disciplinary Court (1985), 19 C.C.C. (3d) 195, 19 D.L.R. (4th) 502, [1984] 2 F.C. 642, 17 C.R.R. 5, 45 C.R. (3d) 242, 57 N.R. 280 [quashed 41 C.C.C. (3d) 287, [1987] 2 S.C.R. 687, 61 C.R. (3d) 387, 50 Man. R. (2d) 127, *sub nom. R. v. Howard*, 102 N.R. 79, 4 C.R.R. (2d) 384*n*, 7 W.C.B. (2d) 87] — **refd to**

Landry v. Legal Services Society (1986), 28 C.C.C. (3d) 138, [1986] 4 W.W.R. 645, 3 B.C.L.R. (2d) 98, 16 W.C.B. 454 — **overd**

Martineau v. Matsqui Institution (Disciplinary Board) (1979), 50 C.C.C. (2d) 353, 106 D.L.R. (3d) 385, [1980] 1 S.C.R. 602, 13 C.R. (3d) 1 (eng), 15 C.R. (3d) 315 (fr), 30 N.R. 119, 4 W.C.B. 178 — **refd to**

McCann v. Canada (1975), 29 C.C.C. (2d) 337, 68 D.L.R. (3d) 661, [1976] 1 F.C. 570 — **refd to**

Palachik v. Kiss (1983), 146 D.L.R. (3d) 385, [1983] 1 S.C.R. 623, 15 E.T.R. 129, 33 R.F.L. (2d) 225, 47 N.R. 148 — **refd to**

R. v. Miller (1985), 23 C.C.C. (3d) 97, 24 D.L.R. (4th) 9, [1985] 2 S.C.R. 613, 16 Admin. L.R. 184, 49 C.R. (3d) 1, 14 O.A.C. 33, 63 N.R. 321, 52 O.R. (2d) 585*n*, 15 W.C.B. 332 — **refd to**

R. v. Morin (1985), 23 C.C.C. (3d) 132, 24 D.L.R. (4th) 71, [1985] 2 S.C.R. 662, 49 C.R. (3d) 26, 63 N.R. 363 — **refd to**

R. v. Shubley (1990), 52 C.C.C. (3d) 481, 65 D.L.R. (4th) 193, [1990] 1 S.C.R. 3, 42 Admin. L.R. 118, 46 C.R.R. 104, 74 C.R. (3d) 1, 37 O.A.C. 63, 104 N.R. 81, 71 O.R. (2d) 63*n*, 9 W.C.B. (2d) 229 — **folld**

R. v. Wigglesworth (1987), 37 C.C.C. (3d) 385, 45 D.L.R. (4th) 235, [1987] 2 S.C.R. 541, 32 C.R.R. 219, 60 C.R. (3d) 193, [1988] 1 W.W.R. 193, 24 O.A.C. 321, 61 Sask. R. 105, 81 N.R. 161, 3 W.C.B. (2d) 130; affg 11 C.C.C. (3d) 27, 7 D.L.R. (4th) 361, 9 C.R.R. 47, 38 C.R. (3d) 388, [1984] 3 W.W.R. 289, 31 Sask. R. 153— **refd to**

Rizzo & Rizzo Shoes Ltd. (Re) (1998), 154 D.L.R. (4th) 193, [1998] 1 S.C.R. 27, 50 C.B.R. (3d) 163, 33 C.C.E.L. (2d) 173, 98 C.L.L.C. ¶210-006 *sub nom. Adrien v. Ontario Ministry of Labour*, 106 O.A.C. 1, 221 N.R. 241, 36 O.R. (3d) 418*n*, 76 A.C.W.S. (3d) 894 — **refd to**

Roberge v. Bolduc (1991), 78 D.L.R. (4th) 666, [1991] 1 S.C.R. 374, 39 Q.A.C. 81, 124 N.R. 1 *sub nom. Dorion v. Roberge*, 25 A.C.W.S. (3d) 597 — **refd to**

Statutes referred to

Canadian Charter of Rights and Freedoms
s. 11(*h*)
Corrections and Conditional Release Act, S.C. 1992, c. 20
s. 38
s. 40
s. 44(1)
Criminal Code
s. 745.6 [re-enacted 1995, c. 22, s. 6; rep. & sub. 1996, c. 34, s. 2(2); am. 1998, c. 15, s. 20]
Interpretation Act, R.S.B.C. 1996, c. 238
s. 8
Legal Services Society Act, R.S.B.C. 1979, c. 227 — now R.S.B.C. 1996, c. 256
s. 3
s. 9 [am. 1987, c. 25, s. 106]
s. 10

Regulations referred to

Corrections and Conditional Release Regulations, SOR/92-620
s. 31(2)
s. 34

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Legal Services Society of British Columbia, *White Paper: Core Services of the Legal Services Society of British Columbia* (Victoria: Legal Services Society, 1994)
Roach, Kent, *Constitutional Remedies in Canada* (Aurora, Ont.: Canada Law Book, 1994) (looseleaf, updated to October 1999)

APPEAL by an inmate from a judgment of the British Columbia Court of Appeal, [1998] 4 W.W.R. 770, 150 W.A.C. 252, 39 B.C.L.R. (3d) 348, 71 A.C.W.S. (3d) 636, [1997] B.C.J. No. 1280 (QL), dismissing his appeal from a judgment of Fraser J., 55 A.C.W.S. (3d) 711, [1995] B.C.J. No. 1001 (QL), dismissing his petition for a declaration that the Legal Services Society of British Columbia was required to provide him with legal representation at a hearing on a charge of a disciplinary offence, and requiring the Legal Services Society to make legal services available to him for his defence on this charge.

John W. Conroy, Q.C., and *Michael Jackson*, for accused, appellant.

Douglas MacAdams and *Mark Benton*, for respondent, the Legal Services Society.

Harvey Groberman and *Neena Sharma*, for respondent, the Attorney General of British Columbia.

[1] BINNIE J. (LAMER C.J.C., L'HEUREUX-DUBÉ, GONTHIER, MCLACHLIN, IACOBUCCI, MAJOR and BASTARACHE JJ. concurring):— I have had the advantage of reading the reasons of my colleague Justice Cory and agree with much of what he has written. Although it was argued that the *Legal Services Society Act*, R.S.B.C. 1979, c. 227, is a complete code under which any proceedings not correctly characterized as criminal are necessarily civil, the issue can be resolved on the more narrow ground proposed by Cory J. at para. 62, with which I agree. We come apart at the final stage of his analysis. He concludes that the appellant has a statutory right to representation by counsel at the prison disciplinary hearing (paras. 76 to 78). In my view, the appellant has established a statutory right to "legal services" in connection with his prison disciplinary hearing, but the Legal Services Society retains a discretion to determine the level of "legal services" to which the appellant is entitled in the circumstances, and the order of this Court should so provide.

[2] In his original petition, repeated in his Notice of Appeal to the British Columbia Court of Appeal dated May 26, 1995, the appellant sought an order in two parts, namely

> An Order declaring that the Respondent is required by the provisions of Section 3 of the *Legal Services Society Act*, R.S.B.C. 1979, c. 227,
>
> (i) *to provide the appellant with legal representation at a hearing* on a charge of a disciplinary offence pursuant to the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 and regulations thereunder; and
>
> (ii) *requiring the respondent Legal Services Society of British Columbia to make legal services available* to the appellant for his defence on a charge pursuant to Section 40(*h*) of the *Corrections and Conditional Release Act* of namely: fights with, assaults or threatens to assault another person, classified as a serious disciplinary offence, on the grounds that the appellant is a qualifying individual who may be imprisoned or confined through civil proceedings or in the alternative that he is a qualifying individual who is a defendant in criminal proceedings that could lead to his imprisonment. [Emphasis added.]

[3] My colleague would make an order granting both branches of the relief sought. With respect, I think the relief should be limited to

the second branch, namely the provision of such legal services as the respondent Legal Services Society determines to be appropriate in the circumstances. The Society did not address this issue in the first instance, having erroneously concluded that the appellant was not entitled to mandatory legal services at all.

[4] Even if it were appropriate for the Court to impose its view of the proper level of legal services, we do not have the information to make a knowledgeable decision.

[5] We know the charge, the nature of the hearing and the potential consequences of conviction to the appellant but beyond that we know nothing of the facts of the alleged offence and little about the issues, legal or factual, that will arise at the hearing. At the end of the day, it may be that counsel is required at the hearing, but the Court has neither the mandate nor the information to make that decision.

[6] It is important to state at the outset that the appellant does not rest his entitlement to publicly funded counsel on any constitutional ground, unlike *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1 (Ont. C.A.). His entitlement, if any, lies in the "mandatory services" provision of the provincial *Legal Services Society Act*, R.S.B.C. 1979, c. 227. He can claim no more than the statute promises to deliver. The only issue here is to what extent a prisoner who does not assert a constitutional right to publicly funded counsel can nevertheless require the Legal Services Society to provide such counsel by reason of s. 3(2) of its governing statute.

[7] It is also important to note that the appellant's right to have counsel at the disciplinary hearing is not contested. It is assured by s. 31(2) of the regulations [SOR/92-620] made under the federal *Corrections and Conditional Release Act*, S.C. 1992, c. 20. The issue is whether the provincial legal aid plan has to provide such counsel at public expense.

Background

[8] The Legal Services Society, in common with legal aid plans across the country, has faced serious problems in meeting the rising demand for legal services in a period of severe government restraint. The Society is a statutory body separate from the provincial government but wholly funded by it through its annual grants. In the relevant year (1993-94) the initial grant amounted to $84.6 million. The Society overran its budget by $14.7 million, but was bailed out

by a supplementary grant. In a document it circulated to "stakeholders" in the provincial legal aid field on January 10, 1994, less than a week after its letter of refusal in this case, the Society estimated that its caseload was increasing by approximately 5 percent per year. It advised stakeholders that, in order to balance its budget over the course of the next six years, its "eligible client base" (*i.e.*, persons eligible for legal aid) would have to be cut by 43 percent on an accrued basis, assuming a constant funding of $90 million per year. Alternatively, the tariff paid to participating lawyers would have to be cut by 48 percent. In the further alternative, the shortfall could be overcome by some blend of reduced tariff and reduced client eligibility.

[9] The Legal Services Society points out that any judicial extension of legal services classified as mandatory under the Act can have severe budgetary consequences. It estimates, for example, that the decision of the British Columbia Court of Appeal in *Gonzalez-Davi v. British Columbia (Legal Services Society)* (1991), 55 B.C.L.R. (2d) 236, 81 D.L.R. (4th) 12, mandating the Society to provide legal representation at immigration hearings, costs the Society about $3.5 million per year. The British Columbia legislature, it should be added, has not thought it fit to amend the statute in light of that decision.

[10] Nevertheless, when considering the appropriate level of legal services to be provided in any given case, the statutory mandate of the Society does not permit it to reduce services to stay within budget. Existence of these financial constraints cannot affect the Legal Services Society's obligation under the statute, if there is one, to provide "mandatory" legal services: *Re Mountain and Legal Services Society* (1983), 5 D.L.R. (4th) 170, 9 C.C.C. (3d) 300 (B.C.C.A.). It explains, however, why the legislature may have wished the Society to preserve some flexibility in the level of legal services provided.

The Statutory Entitlement

[11] I accept my colleague's conclusion that the prison disciplinary proceedings in this case fall within s. 3(2) of the *Legal Services Society Act*. The decisions of the British Columbia Court of Appeal that have carved out and subsequently confirmed an exception to eligibility for "internal proceedings designed to foster order" should

not be followed. Prison disciplinary proceedings can result in up to 30 days' solitary confinement (up to 45 days in the case of multiple convictions) and, for the reasons given by my colleague, this brings the appellant within the entitlement to mandatory legal services provided under s. 3(2) of the *Legal Services Society Act*.

[12] The Act, however, does not define the content of the "legal services" the Society has a duty to make available under s. 3(2). It merely provides that:

> 3(2) The society shall ensure, for the purposes of subsection (1)(*a*), that *legal services* are available . . . [Emphasis added.]

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 . . . [Emphasis added.]

[13] Section 3 uses the expression "legal services" and s. 9 shows that the term "legal services" is used in a very broad sense to include services rendered not only by lawyers or articling students but by individuals who are not lawyers at all, provided they are supervised by a lawyer. The term "legal services" is not synonymous with "legal representation" and the Act nowhere specifies a right to publicly funded legal counsel at a trial or hearing.

[14] Reading the Act as a whole, it seems to me that the Legislature intended the Society to have a discretion to determine when mandatory legal services under s. 3(2) ought to rise to the level of legal representation. The Court should also accept that the Society has some expertise, to which a measure of deference should be paid, in determining the exigencies of legal services in a particular case.

The Society's Decision

[15] In making its decision, of course, the Society must consider all of the relevant circumstances of the application, including the nature of the charge, the procedure for its determination, the severity of the punishment of the applicant if convicted, and other potential indirect consequences such as loss of remission, or prejudice to a potential transfer to a lesser institution.

[16] In this case the Legal Services Society itself did not in the first instance declare the appellant ineligible under s. 3(2) of the Act.

The initial letter of referral of legal aid dated January 6, 1994, simply stated:

> Further to our telephone conversation of January 6, 1994, unfortunately I must refuse your application for legal aid to appoint counsel to represent you at your disciplinary hearing, set for the 26th of January, 1994 at Matsqui Institution. Your application has been refused because *this is not the type of matter for which the Legal Services Society will pay a lawyer on tariff* to represent you. [Emphasis added.]

[17] The appeal decision of the head office of Legal Services Society in Vancouver, however, was framed in terms of a broad exclusion from legal services based either on what has been found to be a misinterpretation of the law in *Landry v. Legal Services Society* (1986), 3 B.C.L.R. (2d) 98, 28 C.C.C. (3d) 138 (C.A.), or a policy based on financial constraints that "fettered" any consideration of individual circumstances. The relevant portion of the decision is contained in one sentence:

> Because of our limited resources, legal aid is not granted to persons facing disciplinary hearings.

The matter must therefore go back to the Legal Services Society for reconsideration. The remaining issue is whether, as my colleague suggests, the reconsideration must result in the provision of legal counsel at the disciplinary hearing. In my opinion it does not.

The Society's Discretion

[18] The expression "services ordinarily provided by a lawyer" in s. 3(1)(*a*) is broad enough to include everything from preliminary advice to counsel work at a hearing. Section 10 provides that the Society has the authority to determine the priorities and criteria for the services "it or a funded agency provides" under the Act. In the case of mandatory services, the level of service is essentially determined by the exigencies of the situation confronting the applicant, not the size of the Society's bank account. If the province considers the plan is too expensive, it will have to amend the legislation to cut back on the provision of mandatory services. Nevertheless, the Society, correctly in my view, recognizes that part of the ordinary services provided by a lawyer to a client is an assessment of the cost effectiveness of varying levels of service. Few clients of ordinary means are prepared to throw away private money on legal fees without regard to the merits or other circumstances of a case. It should be equally undesirable to throw away public money.

[19] The Society has recognized this reality of lawyer-client relationships in its working definition of the appropriate level of legal services. It aims to provide legal services "at least equivalent to that which a reasonable person of average means would expect to receive from a properly instructed competent member of the legal profession" (*White Paper: Core Services of the Legal Services Society of British Columbia*, 1994). This would not necessarily amount to legal representation at the hearing, although it might very well do so. When legal representation at the hearing is that which a reasonable person of average means expects to receive, the Society is under a statutory duty to provide counsel at the hearing, despite its understandable concern about budgetary limitations.

[20] The Legal Services Society has in fact established with its discretionary funding a Prisoners' Legal Services Staff Counsel Office at Abbottsford, British Columbia, in an area where a number of federal penal institutions have been established. Staff counsel specialize in prisoners' issues and could readily perform an evaluation function to determine the appropriate level of legal services in the circumstances.

Risk of Solitary Confinement

[21] The legislature itself established risk of imprisonment as a trigger for mandatory legal services. Imprisonment includes, as my colleague demonstrates, solitary confinement as "a prison within a prison": *Martineau v. Matsqui Institution Disciplinary Board*, [1980] 1 S.C.R. 602 at p. 622, 50 C.C.C. (2d) 353, 106 D.L.R. (3d) 385.

[22] I agree with my colleague that ordinarily the prospect of solitary confinement would persuade a reasonable person of average means to have counsel at the hearing. However, the task of the Legal Services Society is complicated by the fact that solitary confinement is theoretically available for a vast range of offences under the federal *Corrections and Conditional Release Act*. It may or may not be even a remote possibility in a particular case.

[23] Section 40 of the *Corrections and Conditional Release Act* creates a list of possible charges, which runs the gamut from being "disrespectful or abusive toward a staff member in a manner that could undermine a staff member's authority" to refusing to work "without reasonable excuse", gambling, to attempted escape or

participating in a disturbance. The Act does not differentiate between minor "types" of offences and serious "types" of offences.

[24] The risk of solitary confinement, where it exists, flows from an administrative procedure by prison staff to allocate charges between two possible modes of trial — "minor" charges to be tried before prison staff personnel, and "serious" charges which are tried before a disciplinary court consisting of two staff members and an independent chairperson, who must be a qualified lawyer.

[25] There are no guidelines or criteria spelled out in the Act or regulations governing this allocation of cases to one mode of trial or the other, but it is accepted that "serious offences" are generally those which could be said to compromise the institution's security or the personal safety of its inhabitants.

[26] Only the disciplinary court chaired by an independent chairperson can impose solitary confinement, but it can do so, theoretically, in every case that comes before it. There are approximately 1,000 hearings each year before disciplinary courts in British Columbia in federal institutions alone. There are no statistics to show the percentage of these cases that resulted in solitary confinement. We were provided with no reliable statistics on either issue with respect to the risk of solitary confinement in provincial institutions.

[27] While the disciplinary court has the power to impose solitary confinement in all matters referred to it, it may also, depending on its view of the gravity of the offence, impose such lesser penalties as the loss of privileges, performance of extra duties or restitution of stolen property. Solitary confinement could last between a part of a day to a maximum of 30 days for a single offence.

[28] Regulation 34 provides that the disciplinary court must impose the least restrictive sanction commensurate with the gravity of the offence.

[29] Having regard to this rather elastic disciplinary structure, I do not think the intention can be attributed to the Legislature of British Columbia to mandate legal representation for everything which the federal Parliament chooses to designate as an offence carrying the potential of solitary confinement.

Application to the Facts of This Case

[30] The appellant is charged with assaulting a fellow prisoner. A prison staff person ticked a box labelled "serious". We have no other

particulars about the nature or gravity of the assault. In these circumstances, "services ordinarily provided by a lawyer" would include a preliminary investigation of the facts giving rise to the disciplinary charges, and advice about the range of potential outcomes, and the chances of success. This is a function that could be performed by the Legal Services Society staff counsel, or even a non-lawyer staff person who is well versed in prison matters, provided that any advice given by that person is "under the supervision of a lawyer" (s. 9). It might be expected that in many cases the best advice would be to have a lawyer at the hearing. The prospect of solitary confinement, if a plausible risk in the circumstances, would argue for such an outcome.

[31] In some circumstances, however, the best advice might be that there is no useful role for a lawyer. The facts may not be in dispute. It may be apparent that solitary confinement, while theoretically available, is not a realistic possibility and that legal counsel at the hearing is unnecessary. The Society should not be required to provide more than a reasonable person of average means would provide for himself or herself.

[32] A rule that required the Society to provide counsel at any hearing where the prisoner was potentially at risk of solitary confinement would impose a wholly unjustified financial burden on the Society.

Disposition

[33] The Legal Aid Society clearly erred in law in deciding that it was not obliged, in the circumstances, to provide "legal services" to the appellant. While the appellant has in fact served 38 days in solitary confinement for the offence, the issue is not moot because he still faces the prospect that a conviction will affect the application he intends to make for parole after 15 years under the "faint hope" provision of the *Criminal Code*. It is for the Legal Services Society to decide, within the proper limits of its administrative discretion, the appropriate level of "legal services" mandated by s. 3(2) of the Act in the circumstances. I would accordingly allow the appeal with costs throughout on a party and party basis, set aside the judgment of the Court of Appeal [[1998] 4 W.W.R. 770], and refer the matter to the Legal Services Society for disposition in accordance with these reasons.

[34] CORY J. (dissenting in part):—Solitary confinement may have severe consequences. Pursuant to the *Corrections and*

Conditional Release Act, S.C. 1992, c. 20, an inmate charged with a serious disciplinary offence could face up to 30 days in solitary confinement if the offence is established. Should such an inmate be entitled, pursuant to the *Legal Services Society Act* of British Columbia, to the provision of legal services at his hearing? That is the question raised in this appeal.

I. Factual Background

[35] The appellant is serving a life sentence for aiding and abetting the commission of a first degree murder. On November 25, 1993, he was charged with assaulting another person contrary to the provisions of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20. This offence is very properly classified as serious. As a result, it was to be heard by an independent chairperson at a disciplinary hearing.

[36] The appellant was charged with the offence and placed in solitary confinement in Matsqui Institution, a medium security penitentiary, until December 8, 1993. He was then transferred to Kent Institution, a maximum security facility, where he remained in solitary confinement until December 30, 1993, a total of 38 days.

[37] A hearing scheduled for December 1, 1993, was adjourned when the appellant requested that he be represented by counsel. At that time, he had only a Grade 10 education. He possessed none of the skills required to conduct a trial. He had very little knowledge of the law, and was facing the prospect of spending a substantial amount of time in solitary confinement. He was also concerned that a conviction for this offence could be used as evidence against him at his parole eligibility hearing under s. 745.6 of the *Criminal Code*, R.S.C. 1985, c. C-46. That hearing might result in the appellant being eligible for parole after 15 years rather than 25.

[38] The appellant could not afford to hire a lawyer and his attempts to retain a lawyer *pro bono* were unsuccessful. The disciplinary hearing reconvened on December 8, 1993, but the appellant was granted a further adjournment to January 5, 1994, to contact an employee of Prisoners' Legal Services, a branch office of the respondent Legal Services Society. Subsequently, the hearing was adjourned again to January 26, 1994.

[39] On January 6, 1994, a Legal Services Society lawyer advised the appellant that, although he was financially eligible to have counsel

appointed to act on his behalf, prison disciplinary hearing charges were not covered by the *Legal Services Society Act*, R.S.B.C. 1979, c. 227. He was also told that, had he been charged under the *Criminal Code*, it was likely that counsel would have been appointed to act for him. The appellant appealed the decision to the Legal Services Society's head office and the hearing of the charge was adjourned to March 9, 1994, to await the outcome of the appeal. His appeal was dismissed by the Legal Services Society.

[40] The appellant brought a Petition before the Supreme Court of British Columbia for a declaration that the Legal Services Society is required to provide him with counsel. The Petition was dismissed. The court considered itself bound by the decision in *Landry v. Legal Services Society* (1986), 3 B.C.L.R. (2d) 98, 28 C.C.C. (3d) 138 (C.A.). The Court of Appeal dismissed the appellant's appeal, holding that it was also bound by *Landry*.

II. Relevant Statutory Provisions

[41] *Legal Services Society Act*, R.S.B.C. 1979, c. 227, s. 3

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.

Corrections and Conditional Release Act, S.C. 1992, c. 20

38. The purpose of the disciplinary system established by sections 40 to 44 and the regulations is to encourage inmates to conduct themselves in a manner

that promotes the good order of the penitentiary, through a process that contributes to the inmates' rehabilitation and successful reintegration into the community.

. . . . .

40. An inmate commits a disciplinary offence who

(*a*) disobeys a justifiable order of a staff member;

(*b*) is, without authorization, in an area prohibited to inmates;

(*c*) wilfully or recklessly damages or destroys property that is not the inmate's;

(*d*) commits theft;

(*e*) is in possession of stolen property;

(*f*) is disrespectful or abusive toward a staff member in a manner that could undermine a staff member's authority;

(*g*) is disrespectful or abusive toward any person in a manner that is likely to provoke a person to be violent;

(*h*) fights with, assaults or threatens to assault another person;

(*i*) is in possession of, or deals in, contraband;

(*j*) without prior authorization, is in possession of, or deals in, an item that is not authorized by a Commissioner's Directive or by a written order of the institutional head;

(*k*) takes an intoxicant into the inmate's body;

(*l*) fails or refuses to provide a urine sample when demanded pursuant to section 54 or 55;

(*m*) creates or participates in

(i) a disturbance, or

(ii) any other activity

that is likely to jeopardize the security of the penitentiary;

(*n*) does anything for the purpose of escaping or assisting another inmate to escape;

(*o*) offers, gives or accepts a bribe or reward;

(*p*) without reasonable excuse, refuses to work or leaves work;

(*q*) engages in gambling;

(*r*) wilfully disobeys a written rule governing the conduct of inmates; or

(*s*) attempts to do, or assists another person to do, anything referred to in paragraphs (*a*) to (*r*).

. . . . .

44(1) An inmate who is found guilty of a disciplinary offence is liable, in accordance with the regulations made under paragraphs 96(*i*) and (*j*), to one or more of the following:

(*a*) a warning or reprimand;
(*b*) a loss of privileges;
(*c*) an order to make restitution;
(*d*) a fine;
(*e*) performance of extra duties; and
(*f*) in the case of a serious disciplinary offence, segregation from other inmates for a maximum of thirty days.

III. Prior Judgments

A. Supreme Court of British Columbia

[42] Fraser J. noted that the British Columbia Court of Appeal in *Landry*, *supra*, had held that prison disciplinary proceedings do not fall within s. 3(2) of the *Legal Services Society Act* and that there was no obligation on the Legal Services Society to provide counsel for those proceedings. However, in *Gonzalez-Davi v. British Columbia (Legal Services Society)* (1991), 55 B.C.L.R. (2d) 236, 81 D.L.R. (4th) 12, the Court of Appeal held that someone "threatened with confinement or imprisonment and otherwise qualified" is entitled to assistance. Hutcheon J.A. held that *Landry* was distinguishable because prison disciplinary proceedings are "domestic matters involving internal administration of the institution" and *Landry* "should be applied only to facts of a similar nature". By way of comparison, *Gonzalez-Davi* was subject to arrest and detention as a result of his hearing before the Immigration Board. It was held that in these circumstances he was entitled to have counsel provided to him.

[43] Fraser J. held that the petitioner was threatened with confinement or imprisonment within the meaning of *Gonzalez-Davi*, *supra*. First, he might be prejudiced at the hearing held pursuant to s. 745.6 of the *Criminal Code* and, second, a finding of guilt could lead to the imposition of solitary confinement for up to 30 days. It did not matter that the appellant was already in prison: parole is different from custody and ordinary custody is different from solitary confinement. However, Fraser J. also noted that the Court of Appeal in *Landry* implicitly held that the Legal Services Society's obligation to provide counsel is not triggered solely by the potential consequences to the applicant but is also affected by the source of the consequences and the reason for their imposition.

[44] Fraser J. determined that he was bound by *Landry* since the Court of Appeal itself had distinguished that case in *Gonzalez-Davi*. He therefore dismissed the petition.

B. Court of Appeal for British Columbia

1. Esson J.A. (Newbury J.A. concurring)

[45] Esson J.A. held that the question was entirely one of interpreting the *Legal Services Society Act* which had not been amended in any relevant particular since 1979. *Landry*, *supra*, was a considered decision and notwithstanding *Gonzalez-Davi*, *supra*, he found that this division of the Court of Appeal was bound by it.

2. McEachern C.J.B.C. (Newbury J.A. concurring)

[46] McEachern C.J.B.C. noted that the appellant had requested that five judges of the Court of Appeal be assembled to hear the case but that he had declined to make such an order. He held that [[1998] 4 W.W.R. 770 at p. 772],

> . . . I think the law is settled and that it would serve no purpose in my view to order that the matter be argued again. The law has stood as it is since *Landry*, and I do not think we should lightly reconsider these matters or order five judges to hear an appeal merely because it cannot succeed without reconsidering what appears to be satisfactorily settled law.

IV. Analysis

A. General Principles of Statutory Interpretation

[47] At the core of this appeal is the correct interpretation to be given to s. 3(2) of the *Legal Services Society Act*. The general principles of statutory interpretation were considered most recently in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, 154 D.L.R. (4th) 193. Iacobucci J. set out the principles which should be applied when interpreting legislation in this manner:

1. The words of a statute "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" (E. Driedger, *Construction of Statutes*, 2nd ed. (1983), at p. 87).
2. The legislature should be assumed not to have intended to produce absurd results:

   > [A]n interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent, or if it is incompatible with other provisions or with the object of the legislative enactment . . . [Moreover,] a label of absurdity can be attached to interpretations which defeat the purpose of a statute or render some aspect of it pointless or futile. [*Rizzo Shoes*, *supra*, para. 27, citing *Driedger on the Construction of Statutes*, 3rd ed. (1994), at p. 88.]

3. Statutes should be deemed to be remedial. According to the *Interpretation Act*, R.S.B.C. 1996, c. 238, s. 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".

These principles must govern the interpretation of ss. 3(2)(*a*) and (2)(*b*), which are at issue in this appeal. They provide:

> 3(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 . . .

B. The Requirements of Section 3(2)

[48] To qualify under s. 3(2), an applicant for legal aid assistance must meet a two-part test. First, the proceedings must be either criminal or civil in nature. Second, the proceedings, if criminal, must possibly lead to imprisonment and, if civil, to imprisonment or confinement. Thus, contrary to the appellant's position that only the consequences are relevant, both the nature *and* the consequences of the proceedings must be considered in determining whether an applicant qualifies under s. 3(2). The appellant's position would render the words "criminal proceedings" and "civil proceedings" superfluous. This cannot have been the intention of the legislature. *Rizzo Shoes*, *supra*, makes it clear that *all* words in a statute must be given meaning.

C. Application of Section 3(2)

1. Section 3(2)(a): Criminal Proceedings

[49] Are prison disciplinary hearings criminal proceedings that can lead to imprisonment? This question was considered in *R. v. Shubley*, [1990] 1 S.C.R. 3, 52 C.C.C. (3d) 481, 65 D.L.R. (4th) 193, albeit in a somewhat different context. The issue in that appeal was whether a prison disciplinary offence constituted an "offence" within the scope of s. 11(*h*) of the *Canadian Charter of Rights and Freedoms*. That subsection provides that a person found guilty and punished for an offence cannot be punished for it again. It was held by the majority that a conviction in a prison disciplinary proceeding did not constitute punishment for an "offence" within s. 11(*h*).

[50] McLachlin J. writing for the majority applied the decision of Wilson J. in *R. v. Wigglesworth*, [1987] 2 S.C.R. 541, 37 C.C.C. (3d) 385, 45 D.L.R. (4th) 235. In that case, it was held that if a proceeding is to be barred by s. 11(*h*) the proceedings must, by their very nature, be either criminal proceedings or result in punishment which involves the imposition of true penal consequences. To ascertain whether proceedings by their very nature are criminal, it is necessary to examine the nature of the proceedings themselves rather than the act which gives rise to them. *Wigglesworth* confirmed that an act can have various aspects, each of which can give rise to proceedings. Both McLachlin J. in *Shubley* and Wilson J. in *Wigglesworth* quoted with approval the following passage from Cameron J.A. at the Saskatchewan Court of Appeal in *R. v. Wigglesworth* (1984), 7 D.L.R. (4th) 361 at pp. 365-66, 11 C.C.C. (3d) 27:

> A single act may have more than one aspect, and it may give rise to more than one legal consequence. It may, if it constitutes a breach of the duty a person owes to society, amount to a crime, for which the actor 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 actor 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 actor must account to his professional peers.

McLachlin J. considered whether prison disciplinary hearings are criminal proceedings and concluded that they are not. Rather, their purpose is to maintain internal institutional discipline. At p. 20:

> 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. In keeping with that purpose, the proceedings are conducted informally, swiftly and in private. No courts are involved.

[51] McLachlin J. then asked whether the consequences attendant upon a finding of guilt in a prison disciplinary hearing were "true penal consequences". She quoted from Wilson J.'s decision in *Wigglesworth* in which Wilson J. defined true penal consequences as follows (at pp. 560-61):

> This is not to say that if a person is charged with a private, domestic or disciplinary matter which is primarily intended to maintain discipline, integrity or to regulate conduct within a limited private sphere of activity, he or she can never possess the rights guaranteed under s. 11. Some of these matters may

> well fall within s. 11, not because they are the classic kind of matters intended to fall within the section, but because they involve the imposition of true penal consequences. *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.]

McLachlin J. found that the punishment imposed on Mr. Shubley by the prison disciplinary court — close confinement for five days on a special diet that fulfils basic nutritional requirements — did not constitute true penal consequences. At p. 23 she wrote:

> 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.

[52] Justice Wilson and I dissented, finding that "solitary confinement" was a true penal consequence coming within the second branch of the *Wigglesworth* test. In those reasons, I found that "close confinement" was a punishment distinct in kind from the incarceration to which the general prison population is subjected.

[53] It was observed that the substantial and deleterious effects of solitary confinement are well documented and have long been known. At p. 9 of *Shubley*, I wrote:

> 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.* [Emphasis added.]

Because of these substantial effects, solitary confinement is not simply an alternative manner of imprisonment in which a prisoner may serve his sentence. It is a punishment different in kind from general incarceration and reduces the residual liberties that even an incarcerated individual possesses. At pp. 9-10:

> Solitary confinement certainly cannot be considered as a reward for good conduct. It is, in effect, an additional violation of whatever residual liberties an inmate may retain in the prison context and should only be used where it is justified . . . *I would conclude, therefore, that solitary confinement must be*

treated as a distinct form of punishment and that its imposition within a prison constitutes a true penal consequence. [Emphasis added.]

[54] However, I must follow the reasons of the majority in *Shubley*, *supra*. They are binding upon me and I must loyally follow them. *Shubley* has concluded that prison disciplinary hearings are not criminal proceedings. Under s. 3(2)(*a*) of the *Legal Services Society Act*, an applicant must meet both branches of the test. As the appellant fails the first part, that is, the nature of the proceedings, there is no reason to consider the second part, the consequences of the proceedings. The question as to whether the imposition of punitive dissociation (solitary confinement) constitutes imprisonment need not be answered.

2. Section 3(2)(b): Civil Proceedings

[55] It now must be determined whether disciplinary proceedings that may result in solitary confinement come within the term "civil proceedings" in s. 3(2)(*b*). The definition of what is a "civil" proceeding has varied. The term is used most often simply as a counterpoint to "criminal", and it is this definition that the appellant submits is the correct meaning to be given to this section. That is, any proceeding that is not criminal is, by definition, civil. Section 3(2) is thus comprehensive and all proceedings that have the potential to lead to imprisonment or confinement fall within its ambit.

[56] In *Landry*, the British Columbia Court of Appeal found that disciplinary hearings are a matter of internal administration. However the appellant submits that a prison disciplinary hearing cannot be so classified. He points to the absence of any contract or consensual agreement between an inmate and the penal institution in which he is incarcerated to support this position. It is argued that it is this absence which distinguishes the position of a prisoner from that of the members of a union or a professional body, such as a law society, who have willingly and specifically chosen to be bound by its by-laws and who can be punished for a breach of them.

[57] It is significant that this position is supported by Dickson J. (as he then was) in his concurring judgment in *Martineau v. Matsqui Institution Disciplinary Board (Martineau No. 2)*, [1980] 1 S.C.R. 602 at p. 626, 50 C.C.C. (2d) 353, 106 D.L.R. (3d) 385:

> Parenthetically, this notion of contractual commitment to rules of internal discipline, a sort of *volens*, is sometimes advanced in support of the argument for a disciplinary exception. *Whatever may be the force of that argument in*

other contexts, it is wholly inapplicable in a prison environment. [Emphasis added.]

[58] As well, the appellant notes that the Legal Services Society considers the provision of legal services to prisoners facing post-suspension, post-revocation and detention hearings to be mandatory (*White Paper: Core Services of the Legal Services Society of British Columbia*, April 15, 1994, at p. 33). He contends that there is no principled way to distinguish between these types of hearing and prison disciplinary hearings. In all these proceedings a prisoner's liberty interest is potentially at stake.

[59] On the other hand, the respondent Legal Services Society submits that the fundamental criterion of civil proceedings is that they deal with rights of a "personal and private nature". Prison disciplinary hearings are not civil in nature for the purposes of s. 3(2)(*b*) because their basic purpose is to maintain the internal good order of the institution. The Legal Services Society distinguishes post-suspension, post-revocation and detention hearings from prison disciplinary hearings based on the private rights in issue; the offender has a private right to parole or statutory release that could be affected by the outcome of the post-suspension, post-revocation or detention hearing. In contrast, the Legal Services Society submits, the principal purpose of prison disciplinary hearings is the maintenance of internal good order and discipline within the penitentiary and not the adjudication of private rights or the provision for redress of the violation of private rights. In short, they are a fundamentally different type of proceeding.

[60] The respondent the Attorney General of British Columbia submits that the word "proceedings" found in s. 3(2)(*b*) should properly be confined to court proceedings because of the formal procedures and rules of evidence that make legal training so useful in that forum.

[61] I believe it is clear that the use of the word "civil" in s. 3(2)(*b*) must have a meaning beyond the adjudication of rights between two persons. To interpret "civil" in such a way is in effect to render s. 3(2)(*b*) meaningless because imprisonment or confinement would rarely result from an adjudication of rights between individuals. To reach such a conclusion would run counter to the principles of statutory interpretation set out in *Rizzo Shoes*, *supra*, since the term *must* be given a meaning that accords with the statute as a whole.

[62] In *Black's Law Dictionary*, 6th ed. (1990), "civil" is defined as follows: "Of or relating to the state or its citizenry. Relating to private rights and remedies sought by civil actions as contrasted with criminal proceedings." The definition of a "civil action" is an "[a]ction brought to enforce, redress, or protect private rights. In general, all types of actions other than criminal proceedings." This definition essentially accords with that offered by the Legal Services Society: "civil proceedings", as defined in s. 3(2)(*b*), refers to the enforcement, redress or protection of private rights.

[63] However, the Legal Services Society is incorrect in its submission that no private right is in issue in prison disciplinary hearings. In *Martineau No. 2*, *supra*, and the trilogy of *R. v. Miller*, [1985] 2 S.C.R. 613, 23 C.C.C. (3d) 97, 24 D.L.R. (4th) 9, *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643, 23 C.C.C. (3d) 118, 24 D.L.R. (4th) 44, and *Morin v. National Special Handling Unit Review Committee*, [1985] 2 S.C.R. 662, 23 C.C.C. (3d) 132, 24 D.L.R. (4th) 71, it has been specifically determined that incarcerated persons continue to possess a residual liberty interest that can be implicated by institutional action. For example in *Miller*, *supra*, at p. 637, Le Dain J. wrote: "In effect, a prisoner has the right not to be deprived unlawfully of *the relative or residual liberty permitted to the general inmate population of an institution.*" (Emphasis added.) Although prisoners have been deprived in large measure of the liberty enjoyed by most citizens, they continue to possess the liberty enjoyed by the general penitentiary population.

[64] The outcome of a prison disciplinary hearing could result in the imposition of a term in solitary confinement — that is, a period of incarceration *separate* from the general penitentiary population. From this result it follows that a prisoner's private rights can be and are affected by a prison disciplinary hearing. Solitary confinement as punishment (punitive dissociation) can be imposed only after a quasi-judicial proceeding, namely a prison disciplinary hearing, has been held. As such it can be distinguished from solitary confinement intended simply to preserve order in the institution (administrative dissociation) or for the welfare of the inmate (protective custody). Thus, in my view a prison disciplinary hearing is a civil proceeding within the definition of s. 3(2)(*b*) of the *Legal Services Society Act*.

[65] The consequences and effects of solitary confinement on prisoners demonstrate that it is not simply an alternative type of

incarceration. Rather it clearly constitutes a further deprivation of a prisoner's residual liberty interests. The effects of solitary confinement were considered by Heald J. in *McCann v. The Queen* (1975), 29 C.C.C. (2d) 337, [1976] 1 F.C. 570, 68 D.L.R. (3d) 661 (T.D.), a decision that was analysed in detail in Michael Jackson, *Prisoners of Isolation: Solitary Confinement in Canada* (1983). Heald J. made it very clear that he accepted the prisoners' testimony as to the very disturbing effects solitary confinement had upon them. He found that the confinement of the plaintiff McCann and others in the solitary confinement unit of the British Columbia Penitentiary (since closed) amounted to cruel and unusual punishment in violation of s. 2(*b*) of the *Canadian Bill of Rights*.

[66] Professor Jackson points out the difficulty of accurately describing or measuring the effects of solitary confinement on the human psyche, and the dearth of scientific literature detailing the *psychological* effects. Rather research has tended to focus upon the *physical* surroundings of prisoners confined in solitary. Professor Jackson writes at p. 64, "Dostoevsky is a surer guide than Glanville Williams in understanding what it is that we do, in the name of the criminal law, when we send men to the solitary-confinement cells". He notes that prisoner complaints stress the deeply depressing psychological repercussions even more than the physical deprivations of solitary confinement. Testifying in *McCann*, *supra*, Dr. George Scott, then the senior psychiatrist in the Canadian Penitentiary Service, reported that, for example, 11 percent of the prisoners in solitary confinement were involved in slashing incidents compared to 1 percent of the general population and that 6.4 percent had attempted suicide compared to 0.9 percent in the general prison population (*McCann*, at p. 362). Dr. Richard Korn, an expert in criminology and penology, while testifying in *McCann*, said that removing a prisoner for an extended period from the general prison population, that is, from the society in which he has a role, a job, and friends, "condemn[s him] to survive by techniques which would unfit him for that open society" (at p. 356).

[67] It is clear that solitary confinement is not simply a different yet similar form of incarceration than that experienced by the general prison population. Its effects can be serious, debilitating and possibly permanent. They serve to both emphasize and support the conclusion that solitary confinement constitutes an additional and a severe restriction on a prisoner's liberty.

[68] It will be remembered that the Legal Services Society provides counsel for post-suspension, post-revocation and detention hearings. Yet in those circumstances where solitary confinement may be imposed as a result of serious disciplinary charges, the consequences flowing from a prison disciplinary hearing will probably be more severe, and at the very least as severe, as those that may flow from those hearings for which counsel is provided. There is no principled way to distinguish between these four different civil proceedings. It follows that prison disciplinary hearings are civil proceedings within the meaning of s. 3(2)(*b*).

[69] The appellant has met the first part of the test laid out in s. 3(2)(*b*).

3. Section 3(2)(b): Confinement or Imprisonment

[70] The second part of the test that the appellant must meet to succeed in this appeal is to show that he "may be imprisoned or confined" as a result of the prison disciplinary hearing. As a result of being charged under the *Corrections and Conditional Release Act*, the appellant spent a total of 38 days in solitary confinement.

[71] In *Shubley*, *supra*, it was determined that "close confinement" is not imprisonment. At p. 23 McLachlin J., for the majority, writes:

> 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.]

Imprisonment is clearly a true penal consequence within the meaning given the term in *Wigglesworth*, *supra*. By inference, then, if solitary confinement is not a true penal consequence, it cannot be equated with imprisonment that is separate and different from the incarceration already experienced by an inmate. The question that remains is whether solitary confinement is "confinement" within the meaning of s. 3(2)(*b*).

[72] It is noteworthy that the Legal Services Society concedes that the prison disciplinary hearings faced by the appellant may lead to his confinement pursuant to s. 3(2)(*b*). The Attorney General of

British Columbia disputes this concession. He submits, instead, that s. 3(2)(*b*) is intended to provide legal services to someone who faces a civil proceeding "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.*" (Emphasis added.) In effect the Attorney General contends that a currently incarcerated person cannot be confined.

[73] This assumption, with respect, must be rejected. *Martineau (No. 2)*, *supra*, together with the trilogy of *Miller*, *supra*, *Morin*, *supra*, and *Cardinal*, *supra*, make it very clear that incarcerated persons retain a residual liberty interest. This interest can be defined as the right to be treated in the same way as other members of the general prison population. Although these cases dealt with the duty resting upon prison officials to act fairly when disciplining prisoners, implicit in the reasons is the acknowledgment that prisoners retain certain enforceable private rights. See for example the following statement by Le Dain J. in *Miller*, *supra*, at p. 641:

> Confinement in a special handling unit, or in administrative segregation as in *Cardinal*, is a form of detention that is distinct and separate from that imposed on the general inmate population. *It involves a significant reduction in the residual liberty of the inmate. It is in fact a new detention of the inmate, purporting to rest on its own foundation of legal authority.* [Emphasis added.]

Le Dain J. carefully distinguished between "form[s] of confinement or detention in which the actual physical constraint or deprivation of liberty . . . is more restrictive or severe than the normal one in an institution" and "the mere loss of certain privileges" (at p. 641). This statement is in accord with his writing in *Cardinal*, *supra*, at p. 653 that confinement in administrative dissociation or in a special handling unit is a "significantly more restrictive and severe for[m] of detention than that experienced by the general inmate population".

[74] Subsection 44(1)(*f*) of the *Corrections and Conditional Release Act*, provides that an inmate found guilty of a "serious disciplinary offence" may face "segregation from other inmates for a maximum of thirty days". It is clear from the trilogy of cases that segregation, whether administrative as in *Cardinal* or punitive as in this appeal, is a form of incarceration more restrictive than the incarceration experienced by the general prison population. It results in a deprivation of that residual liberty interest possessed by prisoners

within our penitentiaries. This deprivation represents a further confinement of the appellant in a prison within a prison. It certainly constitutes a "confinement" within the meaning of s. 3(2)(*b*).

[75] Solitary confinement has in the past and will undoubtedly have a significant and deleterious effect upon prisoners. Nonetheless, it is a punishment that may well be required in order to protect other prisoners and custodians and to ensure an appropriate standard of discipline in the penitentiary. Maintaining order in a medium or maximum security setting must at times be daunting to say the least. Yet the maintenance of order is essential for all within its confines. It is because of the possible effects and consequences of solitary confinement that a fair hearing is required. Fairness requires that the prisoner be provided with legal counsel.

[76] The concurring judgment of MacGuigan J.A. in *Howard v. Presiding Officer of the Inmate Disciplinary Court of Stony Mountain Institution* (1985), 45 C.R. (3d) 242, 19 C.C.C. (3d) 195, 19 D.L.R. (4th) 502 (F.C.A.), provides some useful guidance as to the necessity of legal counsel in prison disciplinary hearings. He considered the presence of a lawyer for the prisoner to be essential in hearings in which an inmate faced the possibility of losing earned remission. At p. 283 he wrote:

> In sum, other than, perhaps, in fact situations of unique simplicity, I cannot imagine cases where a possible penalty of earned remission would not bring into play the necessity for counsel. *Indeed, in my view the probability that counsel will be required for an adequate hearing on charges with such consequences is so strong as to amount effectively to a presumption in favour of counsel, a departure from which a presiding officer would have to justify.* [Emphasis added.]

A prisoner earns remission for his good behaviour in prison. He can lose it as the result of disciplinary measures taken pursuant to the *Corrections and Conditional Release Act*. Earned remission effectively shortens the time a prisoner spends in prison but does not affect the manner in which he spends his time in prison.

[77] By way of comparison, solitary confinement with its very real deprivation of privileges can have a significant impact on the manner in which a prisoner is incarcerated, as well as affecting his right to earn remission. Representation by counsel obviously assumes an even greater importance when solitary confinement may be imposed as a punishment.

[78] By way of summary the following can be stated:

1. As a result of the serious disciplinary charge, the appellant faced the possibility of punishment by way of solitary segregation.
2. The disciplinary proceedings are civil proceedings within the meaning of that term as it is used in s. 3(2)(*b*) of the *Legal Services Society Act*.
3. Solitary segregation constitutes confinement as that term is used in s. 3(2)(*b*).
4. It follows that the appellant has met the requirements of s. 3(2)(*b*) of the *Legal Services Society Act* and is entitled to be provided with the services of a lawyer for the disciplinary hearing.
5. As a result of the conclusions outlined in these reasons I cannot, with the greatest of respect, agree with the decision of the British Columbia Court of Appeal in *Landry*, *supra*.

V. Costs

[79] The appellant seeks his costs in this Court and in the courts below on a solicitor-client basis. It is well settled that solicitor-client costs are unusual. They should not be awarded unless there is something in the behaviour of the losing party that takes the case outside the ordinary. See K. Roach, *Constitutional Remedies in Canada* (looseleaf), at para. 11.860. For example, solicitor-client costs were awarded when this Court was of the opinion that the unsuccessful party should not have pursued the litigation or the unsuccessful party had been unreasonable in some other way. See *Palachik v. Kiss*, [1983] 1 S.C.R. 623, 146 D.L.R. (3d) 385. They have also been awarded when a respondent without financial resources who had not wished to pursue the case to this Court was successful in a case which was of considerable importance to a large group or class: *Roberge v. Bolduc*, [1991] 1 S.C.R. 374, 78 D.L.R. (4th) 666. An exception was also made where a respondent public interest group was successful. See *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 at p. 80, 88 D.L.R. (4th) 1, in which La Forest J. awarded solicitor-client costs "given the Society's circumstances and the fact that the federal Ministers were joined as appellants even though they did not earlier seek leave to appeal to this Court".

[80] It is certainly true that in the highest and best traditions of the Bar the appellant's counsel has worked long, diligently and with

great skill to represent an indigent appellant. He is deserving of high praise. Nonetheless, there is nothing in this case or in the behaviour of the Legal Services Society or the Attorney General of British Columbia which would warrant an award of solicitor-client costs. Therefore the appellant should have his party and party costs throughout.

VI. Disposition

[81] The appellant is a "qualifying individual" within the provision of s. 3(2)(*b*) of the *Legal Services Society Act* and is entitled to the requisite legal services for his disciplinary hearing. The appeal is therefore allowed with costs throughout these proceedings.

Appeal allowed; matter remitted to Legal Services Society.

J.G. v. The Minister of Health and Community Services et al.; Attorney General of Manitoba et al., Interveners

[Indexed as: New Brunswick (Minister of Health and Community Services) v. G. (J.)]

Court File No. 26005

Supreme Court of Canada
Lamer C.J.C., L'Heureux-Dubé, Gonthier, Cory, McLachlin, Major and Binnie JJ.

Heard: November 9, 1998
Judgment rendered: September 10, 1999

Appeal — Mootness — Parent challenging denial of state-funded legal counsel to contest ministerial application for extension of temporary custody order — Parent represented at hearing by pro bono counsel — Children returned to parent prior to appeal — Issue moot but court exercising discretion to hear appeal.

Constitutional law — Charter of Rights — Enforcement of rights — Parent challenging denial of state-funded legal counsel to contest ministerial application for extension of temporary custody order — Remedy available where breach anticipated — Canadian Charter of Rights and Freedoms, s. 24(1).

Constitutional law — Charter of Rights — Right to life, liberty and security — Fundamental justice — Child welfare proceedings — Minister applying for extension of temporary custody order — Parent's right to security engaged — Denial of state-funded legal counsel infringement of principles of fundamental justice — Canadian Charter of Rights and Freedoms, s. 7 — Legal Aid Act, R.S.N.B. 1973, c. L-2.