## PART I

## STATEMENT OF FACTS

### Overview

1. This appeal is brought, pursuant to leave having been granted, from the Judgment of the Court of Appeal for British Columbia dismissing the appellant's appeal from a decision of the Supreme Court of British Columbia, that dismissed his application for a declaration that the Respondent Legal Services Society of British Columbia provide him with legal representation on a charge of assault before the Disciplinary Court in a federal penitentiary.

**Reasons for Judgment of the Court of Appeal of British Columbia, Appellant's Record p. 100**
**Order of the Supreme Court of Canada granting leave to appeal, Appellant's Record, p. 8**
**Notice of Appeal, Appellant's Record, p.9**

2. The ***Legal Services Society Act*** charges the Society with the responsibility of providing financially eligible individuals with legal services in specified proceedings. In particular, legal services are made available to financially eligible persons who are defendants in criminal proceedings that could lead to imprisonment, and to persons who may be imprisoned or confined through civil proceedings. The issue the Appellant brings to the Court is whether charges before a prison discipline court fall into either of the above types of proceeding. It has been agreed throughout that the Appellant is financially eligible for legal aid.

3. This test case raises an issue of statutory interpretation. While not a matter of national importance because the legislation governs only those individuals resident in British Columbia, nevertheless, the issue of law is one of fundamental importance because the exclusion of persons from a general social benefit, without a principled, reasonable or rational and fair legal foundation, is antithetical to justice.

**Affidavit of Arthur Winters, paras 2-6 and Exhibit "A", Appellant's Record, pp.11-12**

### Background Facts

4. The Appellant is serving a life sentence for aiding and abetting a first degree murder that occurred in March 1983. On 25 November, 1993, the Appellant was served with an Inmate Offence Report and Notification of Charge alleging that on 24 November, 1993, he fought with, assaulted, or threatened to assault another person contrary to s. 40(h) of the ***Corrections and Conditional Release Act***. The offence was classified as serious.

**Affidavit of Arthur Winters, paras 2- 6 and Appendix "A", Appellant's Record, pp. 11, 12,**

**17)**
***Corrections and Conditional Release Act***, S.C. 1992, c. 20, (**Appellant's Book of Authorities Tab 21)**

5. The hearing for the charge was scheduled for 1 December, 1993 at 8:30 a.m. As the matter was classified as serious the hearing was set down before an Independent Chairperson. On that date the Appellant asked for and was granted an adjournment to allow him to speak to the Legal Services Society and ask that they appoint a lawyer to act on his behalf.

**Affidavit of Arthur Winters, para 7, Appellant's Record, p.12**

6. The Appellant contacted a lawyer in private practice who informed the Appellant that he required a $2,000 retainer. The Appellant could not afford that amount. Attempts to retain a lawyer to assist the Appellant on a *pro bono* basis were unsuccessful.

**Affidavit of Arthur Winters, para 8, Appellant's Record, p.12**

7. On 8 December, 1993, the Disciplinary Court reconvened and the Appellant asked for and was granted a further adjournment on the ground that an employee of Prisoners' Legal Services (a branch office of the Respondent Legal Services Society) would see him shortly to discuss the charge. The matter was adjourned to 5 January, 1994, when it was adjourned to 26 January, 1994, to allow the Appellant further time to retain and instruct counsel.

**Affidavit of Arthur Winters, paras 9-13, Appellant's Record, pp.13-14**

8. On 6 January, 1994, the Appellant spoke to a lawyer employed by the Legal Services Society. He was told that he was financially eligible under the rules of the Legal Services Society to have counsel appointed to act on his behalf, but that prison Disciplinary Court charges were not covered by the Legal Services Society. A letter dated 6 January, 1994, from Prisoners' Legal Services to the Appellant confirmed that the Appellant's request for counsel to represent him had been refused. He was also given a form to appeal that decision to the head office of the Legal Services Society. The appeal was forwarded to the Legal Services Society on 7 January, 1994

**Affidavit of Arthur Winters, paras 14-16 and Exhibits "B" and "C", Appellant's Record, p.14**

9. On 26 January, 1994, the Appellant again appeared before the prison Disciplinary Court and the matter was adjourned to 9 March, 1994, to await the outcome of the appeal to the Legal Services Society. On or about 31 January, 1994, the Appellant received a letter dated 24 January 1994 from the Legal Services Society stating that his appeal had been dismissed.

**Affidavit of Arthur Winters, paras 17-18 and Exhibit "D", Appellant's Record, pp.14-15**

10. The Appellant was arrested and taken to solitary confinement at Matsqui Institution on November 24th, 1993. He was charged with a disciplinary offence on November 25th, 1993. He remained in solitary confinement at Matsqui Institution until December 8th, 1993. He was then involuntary transferred from Matsqui Institution to Kent Institution, a maximum security institution and he was then placed in solitary confinement at Kent Institution. He remained there until December 30th, 1993 when he was placed into the general population of that maximum security prison. Consequently, because of the charge alone, the Appellant's liberty interests were affected, not only by his placement in solitary confinement initially at Matsqui Institution, but also by the involuntary transfer to higher security and his continued placement in solitary there for a total time in solitary of 38 days

**Affidavit of Arthur Winters, paras 5, 11, 19 and Exhibit "A", Appellant's Record, pp.12, 13, 15, 17, 18**

11. The Appellant was informed by a lawyer at Prisoners' Legal Services that the conduct for which he was charged under the ***Corrections and Conditional Release Act***, could also be the subject of a charge under the ***Criminal Code of Canada***. The Appellant was further informed that had he been charged under the ***Criminal Code***, that it was likely that counsel would have been appointed to act on his behalf in the Provincial Court of British Columbia.

**Affidavit of Arthur Winters, para 20, Appellant's Record, pp.15**

12. The Appellant wished to have counsel assist him because in 1993 he had only a Grade 10 education, no skills at conducting a trial, little knowledge of the law, and in the event he is convicted of the charge risks serving time in solitary confinement. A conviction could also be used as evidence against him at his parole ineligibility review hearing under s. 745 of the ***Criminal Code***. The Appellant can apply for the hearing in 1998, and should he be successful his period of parole ineligibility could be reduced from 25 to 15 years.

**Affidavit of Arthur Winters, paras 13,19 and Exhibit "C", Appellant's Record, pp. 13,15,20**

13. The Appellant's Petition for a declaration that the Respondent Legal Services Society of British Columbia was required to provide him with legal representation at his Disciplinary Court hearing was dismissed because the Court found itself to be bound by the Court of Appeal's decision in ***Landry***.

**Reasons for Judgment of the Honourable Mr. Justice Fraser, Supreme Court of British Columbia, Appellant's Record, p. 93**
***Landry v. Legal Services Society*** (1986), 28 CCC (3d) 138 (BCCA), **(Appellant's Book of Authorities Tab 5)**

14. The Court of Appeal of British Columbia dismissed the appeal with Esson J.A. stating (at pp. 2-3):

> The question is one of statutory interpretation entirely. The statute was enacted in 1979 and has not been amended in any relevant particulars since. ***Landry*** is a fully considered decision. Notwithstanding a later decision on an entirely different set of facts, which may be said to have employed different reasoning, I can see no basis upon which this division could properly regard itself otherwise then as bound by the decision in ***Landry***.
>
> ***Winters v. Legal Services Society***, unreported Oral Reasons for Judgment, 8 May, 1997, Court File #CA020404 (BCCA) at 2-3 (**Appellant's Book of Authorities Tab 19)**

## PART II

## STATEMENT OF POINTS IN ISSUE

15. The central issue is whether prisoners in federal institutions facing Disciplinary Court charges are entitled to legal services funded by the Legal Services Society of British Columbia, or whether it is appropriate for the Courts to carve out a "prisoners exception" from the general rule.

16. The issues of statutory interpretation raised by this case, and which would be of significance to the class of citizens who are incarcerated in prisons in British Columbia, and financially eligible for legal aid, are as follows:

a. Is the Appellant a defendant in criminal proceedings that could lead to his imprisonment and therefore, eligible for legal services under s. 3(2)(a) of the ***Legal Services Society Act***? or

b. Is the Appellant a person who may be imprisoned or confined through civil proceedings and therefore, eligible for legal services under s. 3(2)(b) of the ***Legal Services Society Act***?

## PART III

## ARGUMENT

### Introduction

1. The Legal Services Society is charged with the responsibility of providing legal services to financially eligible individuals facing specified legal proceedings

Section 3 of the ***Legal Services Society Act*** states:

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) he 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.

***Legal Services Society Act***, RSBC 1979, c. 227, s. 3 **(Appellant's Book of Authorities Tab 26)**

1. While s.3(1) of the Act uses the words "services ordinarily provided by a lawyer", the Appellant acknowledges that the language used in s. 3(2) of the Act is that the Society is to ensure that "legal services" are to be made available to a qualifying individual. This may mean the services of a lawyer, but it is not necessarily the case. The Appellant would seek to persuade the Court that the services of a lawyer should be made available to federal prisoners facing Disciplinary Court charges. But on this appeal, the Appellant only seeks to persuade the Court that he is a person who falls within the criteria of s. 3(2) of the Act.

2. In ***Re Mountain***, Lambert J.A. speaking for the Court said that if a person meets the criteria of s. 3(2) of the Legal Services Society Act then the Society must provide the person with legal services. There is no discretion.

***Re Mountain and Legal Services Society*** (1984), 5 DLR (4th) 170 (BCCA) at 178 **(Appellant's Book of Authorities Tab 15)**

***3.*** ***Re Mountain*** involved a person charged with criminal offences. A case on a more similar factual footing to the Appellant's is ***Gonzalez-Davi***, where a person claiming refugee status was incarcerated pending an immigration inquiry. He sought a declaration that the Legal Services Society was required to provide him with legal services. Hutcheon J.A. speaking for the British Columbia Court of Appeal said of s. 3 of the ***Legal Services Society Act*** that:

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

imprisonment and otherwise qualified is left without legal assistance.

> ***Gonzalez-Davi v. Legal Services Society of British Columbia*** (1991), 55 BCLR (2d) 236 (BCCA) at 240 **(Appellant's Book of Authorities Tab 3)**

4. The judgment in ***Gonzales-Davi*** endorses a results or consequences approach. One is to look at whether a person is "threatened with confinement or imprisonment" and if so, "criminal proceedings" and "civil proceedings" are to be given a broad interpretation. This would appear to apply to all types of administrative, quasi-administrative, and disciplinary proceedings, except for prison Disciplinary Court proceedings.

5. The results or consequences approach to s. 3(2) of the ***Legal Services Act*** adopted in ***Gonzalez-Davi*** was also used in ***Re Mountain***. Lambert J.A. speaking for the court said:

> So I think that s. 3(2) must have been intended to place the needs of particular people for particular legal services on a different basis than the general run of needs for legal services, and to impose on the Society a duty to provide legal services, and to impose on the society a duty to provide legal services in the circumstances set out in s. 3(2). In short, if a person's liberty, safety, health or livelihood are in real jeopardy, the Society is required to make legal services available. It must do so. But if liberty, safety, health or livelihood are not in jeopardy, then the Society may allocate its resources as it thinks best.
>
> ***Re Mountain and Legal Services Society***, *supra* at 178 **(Appellant's Book of Authorities Tab 15)**

6. The learned chambers Judge dismissed the Appellant's Petition because he considered himself bound by the Court of Appeal's decision in ***Landry***.

> **Reasons for Judgment of Fraser, J., Appellant's Record, p. 93 at p.99**

7. Macfarlane J.A. speaking for the Court of Appeal in ***Landry*** rejected the results test that was previously used in ***Mountain*** and subsequently used in ***Gonzales-Davi***. Macfarlane J.A. stated:

> It must always be a question of the construction of the particular statute whether an act is prohibited in the sense that it is rendered criminal, or whether the statute merely affixes certain consequences more or less unpleasant to the doing of the act. 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 ….
>
> ***Landry***, *supra* at 106

8. In ***Landry*** a federal prisoner's application for an order that the Legal Services Society make legal services available to him to assist in his defence of a prison Disciplinary Court charge was dismissed. At that time, the charge was for an offence set out in the ***Penitentiary Services Regulations***, but the proce-

dures governing the Disciplinary Court proceedings were set out in Commissioner's Directives. Such Directives were found by this Court in ***Martineau v. Matsqui Institution Inmate Disciplinary Board*** to not have the force of law. Now the current legislation, the ***Corrections and Conditional Release Act,*** sets out not only the purpose of the disciplinary system, and the offences, but also the procedures to be followed prior to a hearing as well as the requirement for a hearing, the test to be applied at such a hearing and the penalties available on conviction. The regulations set out the details with respect to independent chairpersons and further details with respect to the requirements of notice, the hearing procedures and further details in relation to the sanctions available. In other words, the disciplinary process is now infused by and governed by law rather than administrative rules known as Commissioners' Directives.

**Reasons for Judgment of the Honourable Mr. Justice Fraser, Appellant's Record p.93 at p. 99)**
***Landry v. Legal Services Society*** (1986), 3 BCLR (2d) 98 per McFarlane J.A. at p. 104 (BCCA) **(Appellant's Book of Authorities Tab 5)**
***Martineau v. Matsqui Institution Disciplinary Board (No. 2)***, [1980] 1 SCR 602 (SCC) at 622 **(Appellant's Book of Authorities Tab 6)**
***Penitentiary Service Regulations***, C.R.C. 1978, c. 1251
***Corrections and Conditional Release Act***, S.C. 1992, c. 20 **(Appellant's Book of Authorities Tab 21)**
***Corrections and Conditional Release Act Regulations***, SOR/92-620, **(Appellant's Book of Authorities Tab 22)**

9. The carving out of a prisoners exception to the interpretation given to s. 3(2) of the ***Legal Services Society Act*** by the Court of Appeal in ***Landry*** and ***Gonzalez-Davi*** is difficult to reconcile with the general principles affirmed in ***Gonzalez-Davi*** and in ***Mountain***. A disciplinary offence is a charge brought against a person for an offence set out in legislation enacted by Parliament and the proceedings governing the trial and penalty upon conviction for such an offence are also set out in legislation enacted by Parliament and regulations pursuant thereto. It is not a private or domestic matter. It is an offence against the law of Canada and the proceedings in relation to it are also governed by the law of Canada.

10. It is respectfully submitted that the statutory interpretations given to these provisions of the ***Legal Services Society Act*** in ***Re Mountain*** and ***Gonzalez-Davi,*** without any exception being carved out for prison disciplinary proceedings, is the correct interpretation to be given to the words used when they are 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 ..." the legislature and is the interpretation to be given that is consistent with s.8 of the ***Interpretation Act*** of British Columbia.

***Rizzo & Rizzo Shoes Ltd. (Re)*** [1998] 1 SCR 27, paras 21,22,27
***Interpretation Act*** RSBC 1996 c.206, s.8.
***Legal Services Society Act***
***Re Mountain (supra)***
***Gonzalez-Davi (supra)***

**Is the Appellant Subject to Imprisonment or Confinement?**

11. The learned chambers Judge in the court below who heard the Petition found that the Appellant was threatened by confinement or imprisonment. He stated that:

> By either of two routes, one may say that the Petitioner is threatened with confinement or imprisonment. The first is the prospect that, if he is "found guilty" (the words are from s. 44(1) of the ***Corrections and Conditional Release Act***), this will prejudice him at the s. 745 hearing. Of course, this is not a necessary result, nor a direct result, only a possible result, down the road. I conclude, however, that it meets the language of ***Gonzalez-Davi***, in that it holds in it the threat of future confinement. Whether that proposition is sound may be unnecessary to the analysis, however. Given that a finding of guilt can lead to "segregation from other inmates for a maximum of thirty days" [s. 44(1)(f)], that is, solitary confinement, I conclude that the petitioner is faced with imprisonment.
>
> ***Winters v. Legal Services Society***, unreported, 4 May, 1995, Court File #A940574, Vancouver Registry (BCSC) at p. 5 **(Appellant's Book of Authorities Tab 20)**

12. The learned chamber judge's conclusion that confinement in segregation constituted "imprisonment" is supported by this Court's decisions in ***Martineau (No. 2)*** and the trilogy of ***Miller, Cardinal*** and ***Morin***. In ***Martineau (No.2)***, Dickson, J. characterized punitive dissociation (segregation) in this way:

> The Board's decision had the effect of depriving an individual of his liberty by committing him to a prison within a prison.
>
> ***Martineau v. Matsqui Institution Disciplinary Board (No. 2)***, [1980] 1 SCR 602 (SCC) at 622 **(Appellant's Book of Authorities Tab 6)**
> ***Miller v. The Queen***, [1985] 2 SCR 613 (SCC) at 641 **(Appellant's Book of Authorities Tab 10)**
> ***Cardinal v. Director of Kent Institution***, [1985] 2 SCR 643 (SCC) **(Appellant's Book of Authorities Tab 1)**
> ***Morin v. SHU Review Committee***, [1985] 2 SCR 662 (SCC) **(Appellant's Book of Authorities Tab 11)**

13. In Miller, LeDain, J. affirmed that a prisoner, after imprisonment, retained residual rights of liberty which were affected by placement in segregation or a special handling unit:

> Confinement in a special handling unit, or in administrative segregation as in ***Cardinal and Oswald*** 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.
>
> ***Martineau v. Matsqui Institution Disciplinary Board (No. 2)***, [1980] 1 SCR 602 (SCC) at 622 **(Appellant's Book of Authorities Tab 6)**

***Miller v. The Queen***, [1985] 2 SCR 613 (SCC) at 641 **(Appellant's Book of Authorities Tab 10)**
***Cardinal v. Director of Kent Institution***, [1985] 2 SCR 643 (SCC) **(Appellant's Book of Authorities Tab 1)**
***Morin v. SHU Review Committee***, [1985] 2 SCR 662 (SCC) **(Appellant's Book of Authorities Tab 11)**

14. This court in ***Shubley,*** in determining whether or not s.11(h) (double jeopardy) of the ***Charter*** applied to disciplinary proceedings, considered whether an inmate in a provincial jail is subject to imprisonment when faced with an internal discipline charge. The issue in ***Shubley***, as described by McLachlin J., turned on "...whether ***Shubley,*** by reason of the prison disciplinary proceeding has been "finally found guilty and punished" for an 'offence'."

***Regina v. Shubley***, [1990] 1 SCR 3 (SCC) 3 at p. 14 **(Appellant's Book of Authorities Tab 13)**

15. McLachlin, J., writing for herself, Sopinka and Gonthier, JJ. held that the disciplinary proceeding was not criminal in nature and that the punishment involved, five days in closed confinement on a restricted diet, did not constitute "true penal consequences" within the ***Wigglesworth*** test, as it did not involve either punitive fines nor a sentence of imprisonment.

***Regina v. Shubley***, [1990] 1 SCR 3 (SCC) 3 at p. 23 **(Appellant's Book of Authorities Tab 13)**
***R. v. Wigglesworth,*** [1987] 2 SCR 541

16. In ***Shubley***, McLachlin, J. stated that her interpretation that disciplinary proceedings did not constitute proceedings for an offence within s.11(*h*) of the ***Charter***, was in part influenced by the impact of a different conclusion; that it would bring in its train all the constitutional rights which s.11 conferred on an accused. In Her Ladyship's view, the issue of procedural protections for inmates was more properly found in the more flexible guarantees of s.7.

***Regina v. Shubley***, [1990] 1 SCR 3 (SCC) 3 at pp. 23 and 24 **(Appellant's Book of Authorities Tab 13)**

17. In this case, the interpretation of the ***Legal Services Society Act*** sought by the Appellant, does not carry in its train these constitutional implications.

18. In determining whether, for the purposes of the ***Legal Services Society Act***, the punishment of solitary confinement constitutes imprisonment, or at least confinement, this Court should have regard to the historical and contemporary descriptions of this punishment. In 1842, Charles Dickens, after a tour of the Pennsylvania penitentiary system wrote:

> "In its intention, I am well convinced that it is kind, humane, and meant for reformation; but I am persuaded that those who devised this system of Prison Discipline, and those benevolent gentlemen who carry it into execution, do not know what it is that they are doing. I believe that very few

men are capable of estimating the immense amount of torture and agony which this dreadful punishment, prolonged for years, inflicts upon the sufferers; and in guessing at it myself, and in reasoning from what I have seen written upon their faces, and what to my certain knowledge they feel within, I am only the more convinced that there is a depth of terrible endurance in it which none but the sufferers themselves can fathom, and which no man has a right to inflict upon his fellow-creature. I hold this slow and daily tampering with the mysteries of the brain, to be immeasurably worse than any torture of the body: and because its ghastly signs and tokens are not so palpable to the eye and sense of touch as scars upon the flesh; because its wounds are not upon the surface, and it extorts few cries that human ears can hear; therefore I the more denounce it, as a secret punishment which slumbering humanity is not roused up to stay. I hesitated once, debating with myself, whether, if I had the power of saying "Yes" or "No", I would allow it to be tried in certain cases, where the terms of imprisonment were short; but now, I solemnly declare, that with no rewards or honours could I walk a happy man beneath the open sky by day, or lie me down upon my bed at night, with the consciousness that one human creature, for any length of time, no matter what, lay suffering this unknown punishment in his silent cell, and I the cause, or I consenting to it in the least degree." (p. 96)

19. For a more modern description of solitary confinement and its consequences in the context of its imposition by the Correctional Service of Canada in British Columbia, the Court is referred to the decision of Mr. Justice Heald (as he then was) in the Federal Court Trial Division in ***McCann v. The Queen***. The history of the use of solitary confinement and the evolution of Canadian jurisprudence in relation thereto is well described by Professor Michael Jackson in his book "Prisoners of Isolation – Solitary Confinement in Canada" (1983)

> ***McCann v. The Queen*** (1976), 29 C.C.C. (2d) 337 **(Appellant's Book of Authorities Tab 8)**
> **Prisoners of Isolation – Solitary Confinement in Canada,** (1983), University of Toronto Press, by Professor Michael Jackson

20. Writing 130 years after Charles Dickens, Professor Jackson has described the conditions in the segregation units at Matsqui and Kent Institutions in British Columbia, places in which the Appellant would be confined, if convicted:

> Punitive dissociation is a euphemism for solitary confinement, otherwise known as "the hole". Prisoners sentenced to dissociation are detained in a special wing of the prison and are locked up in their cells for twenty-three hours a day. The remaining hour is for exercise during which time they are permitted a limited form of association with other prisoners in the exercise yard. At both Kent and Matsqui Institutions exercise takes place in small enclosed yards which permit a prisoner to do no more than pace up and down. Prisoners are not permitted any vocational or hobby privileges and any visits they receive are closed screen visits.
>
> **The Right to Counsel in Prison Disciplinary Hearings**, Michael Jackson, 1986 20 U.B.C. Law Review, p. 221

21. It is respectfully submitted that this Court should not follow ***Shubley*** and conclude that the Appellant, faced with a serious prison disciplinary offence for which the punishment of solitary confinement is authorised, is not subject to imprisonment, or at least confinement, for purposes of the ***Legal Services Society Act***. In ***Shubley***, this Court's previous decisions in ***Martineau***, ***Cardinal and Oswald***, ***Morin*** and ***Miller*** were not referred to. Further the Appellant is subject to thirty days solitary confinement if he is found guilty, and his liberty is further threatened by the use of such a conviction at the parole ineligibility hearing available to him in 1998 under s. 745 of the Criminal Code.

22. This Court in ***Solosky***, held that an inmate in a federal prison "…retains all of his civil rights, other than those expressly or impliedly taken from him by law." The Appellant respectfully submits that this existing authority holds that prisoners do not give up all of their rights once they are imprisoned, including the right to remain in the general population of the institution. In the trilogy of ***Miller, Cardinal and Oswald*** and ***Morin***, this Court recognized that segregation or solitary confinement is a distinct form of confinement. Consequently, while a prisoner may well lose his general liberty upon being imprisoned, a residual liberty remains that can be further deprived by the imposition of solitary confinement or segregation. The Appellant therefore respectfully submits that as a result of a conviction in a Disciplinary Court, he is, at a minimum "confined" within the meaning of s.3(2)(b) of the ***Act***, and he may also be subject to "imprisonment" within the meaning of ss. 3(2)(a) and (b) of the ***Act***

> ***Solosky v. The Queen***, [1980] 1 SCR 821 (SCC) at 839 **(Appellant's Book of Authorities Tab 18)**

**Is the Appellant Facing Civil Proceedings?**

23. In disciplinary cases before a law society the courts have said that the proceedings are civil in nature.

> ***Donald v. Law Society of B.C.*** , [1984] 2 WWR 46 (BCCA) at 50 **(Appellant's Book of Authorities Tab 2)**
> ***Re James***, [1983] 2 WWR 316 (BCSC) at 317-8 **(Appellant's Book of Authorities Tab 14)**
> ***Rosenbaum v. Law Society of Manitoba***, [1983] 5WWR 753 (Man QB) at 756 **(Appellant's Book of Authorities Tab 17)**

24. When ***Gonzalez-Davi*** was decided the Court of Appeal said that:

> 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***, *supra* at 240

25. That distinction endorsed by the Court of Appeal cannot be reconciled with the findings in ***Donald***, ***James***, and ***Rosenbaum***. Disciplinary hearings before a law society appear to be "domestic matters involving internal administration" of the law society. Yet those matters have been classified as civil by the Court of Appeal. The exception created in ***Landry*** and buttressed in ***Gonzalez-Davi*** that prison disciplinary hearings are domestic matters, neither civil nor criminal, is inconsistent and not easily reconciled with other authorities.

26. The Appellant further says that a Disciplinary Court hearing is not a domestic matter. There is no contractual or consensual agreement between the inmate and the institution. It is the state seeking to bring to trial an individual for an alleged breach of an Act of Parliament. One chooses to join a law society or a union and in so doing can be said to agree to adhere to the rules and procedures of the organization freely joined. Inmates do not enter into any such pact.

27. A statute created adjudicator presides over serious offences in Disciplinary Court. That Independent Chairperson is not an employee of the institution He is an appointee of the Minister, responsible for judging whether offences under the statute have been committed and to impose sentence.

> ***Corrections and Conditional Release Act Regulations***, SOR/92-620, s. 24 **(Appellant's Book of Authorities Tab 22)**

28. In ***Martineau (No. 2)*** Dickson J. said:

> 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.
>
> ***Martineau (No. 2)*** *supra* at 626

29. Section 38 of the ***Corrections and Conditional Release Act*** states that the purpose of the disciplinary system is not limited to ensuring the good order of the institution, but also to protect the public as a whole by contributing to the inmate's rehabilitation. There is a broader more public role for Disciplinary Court than to merely oversee domestic concerns. It is also one of furthering rehabilitation and the reintegration of the inmate into the community.

30. The Legal Services Society Core Services Committee accepts that legal services are to be provided to prisoners facing post-suspension, post-revocation, and detention hearings. It is unknown whether these are seen as criminal or civil proceedings by the Legal Services Society, but it is submitted that no distinction in principle exists between these types of hearings and hearings for disciplinary offences for serious institutional charges.

**Affidavit of David Duncan, sworn 9 June, 1994, Exhibit B - Core Services Committee Report, p. 33 (Appellant's Record, p. 29)**

31. In ***Landry*** the Court of Appeal said that: "…proceedings involving loss of liberty in a prison, or by confinement in a mental institution, may be civil in nature in cases where judicial review in the ordinary courts is appropriate." The Court was apparently unaware that judicial review of prison Disciplinary Court decisions was available under the ***Federal Court Act*** as was confirmed by the decision in ***Martineau (No. 2)***

***Landry***, *supra* at 113-4
***Federal Court Act***, RSC 1970-71-72, c. 1, ss. 18 and 18.1 **(Appellant's Book of Authorities Tab 24)**
***Martineau (No. 2)***, *supra*

32. Federal penitentiary discipline boards were considered "public bodies" by Mahoney J. at the Federal Court Trial Division in ***Martineau***. This position was referred to by the Supreme Court of Canada in ***Martineau (No. 2)***. Similarly, in ***Hull Prison Board*** the Court of Appeal for the United Kingdom rejected the argument that the board of visitors was a private or domestic tribunal.

***Martineau v. Matsqui Institution Inmate Disciplinary Board*** (No. 2) (1978), 37 CCC (2d) 58 (FCTD) **(Appellant's Book of Authorities Tab 7)**
***Martineau (No. 2)*** (SCC) *supra* at 610 and 633
***R. v. Hull Prison Board of Visitors: Ex parte St. Germaine***, [1979] 1 All E.R. 701 (CA) at 464 **(Appellant's Book of Authorities Tab 12)**

***33. Hull Prison Board*** was relied on in the reasons of Pigeon J. and Dickson J. in ***Martineau (No. 2)***. Dickson J. also made reference to the availability of certiorari to those boards performing a public duty, and to such boards as "public bodies" and "public decision makers".

***Martineau (No. 2)***, *supra* at 635-636 (Pigeon J.) at 614, 616, 619, 622-3, 625, 628 (Dickson J.)

34. As previously stated, at the time of ***Landry,*** the legislation in issue was the ***Penitentiary Act*** and its ***Regulations*** and certain Commissioners' Directives. The latter were rules imposed by the Commissioner of Corrections for the training, employment, and discipline of inmates, as well as other matters. Because of the decisions of this Court in ***Martineau (No. 1)*** and ***Martineau (No. 2)***, these Commissioners' Directives were held not to have the force of law. Consequently, at that time, while the offences and penalties were set out in the Regulations pursuant to the ***Penitentiary Act***, all of the procedures were in the Directives. Consequently the entire proceedings were not governed by public law. Now all of the matters governing prison discipline are set out primarily in the ***Corrections and Conditional Release Act*** as well as the ***Regulations*** pursuant thereto. The offence is an offence against a federal statute. It is out of the realm of the private or domestic. In the Appellant's case, it is a federal public law that is being enforced.

It is therefore submitted that the Disciplinary Court proceedings are brought within the meaning of "civil proceedings" under s. 3(2) of the ***Legal Services Society Act***.

> ***Penitentiary Act***, RSC 1985 c. P-5
> ***Penitentiary Service Regulations***, CRC, Vol. XIII, c. 1251
> ***Corrections and Conditional Release Act***
> ***Martineau (No. 2), supra***
> ***Landry***, supra at 104 and 108

**Is The Appellant Facing Criminal Proceedings?**

35. If the Disciplinary Court proceedings are not civil proceedings then they should be characterized as criminal proceedings. Hutcheon J.A. said in ***Gonzalez-Davi*** that the term should be given a sufficiently broad meaning so that persons threatened with confinement or imprisonment have legal assistance.

36. The Appellant says the proceedings are criminal in nature for the following reasons:

(a) he is charged with a specific offence expressed in a federal statute;

(b) officials of federal institutions can be designated as a peace officer under s. 10 of the ***Corrections and Conditional Release Act***, and the person charging the Appellant may have been so designated;

(c) should the Appellant be convicted his sentence is not one agreed to by the parties but one dictated by statute;

(d) the standard of proof at the hearing is the criminal standard of proof beyond a reasonable doubt, and the Independent Chairperson is required to be independent and to make adjudicative decisions (s. 43(3) of the ***Act*** and s. 24 of the ***Regulations***);

(e) the accused is to be notified of the charge in writing and provided with a summary of the evidence (s. 25 of the ***Regulations***);

(f) the inmate has the right to retain and instruct counsel (s. 31(2) of the ***Regulations***); and

(g) the inmate is entitled to a copy of the decision and the hearings are to be recorded ( ss. 32(2) and 33 of the ***Regulations***).

1. The simple absence of the Provincial Attorney General from the proceedings is not determinative of whether a Disciplinary Court hearing is a criminal proceeding. In ***Hauser*** this Court held that it is within federal competence to designate federal agents to prosecute offences against federal statutes such as the ***Narcotic Control Act*** and the ***Food and Drugs Act***. A similar result was reached in ***McKay*** with respect

to Court Marital proceedings against servicemen under military law.

> ***Hauser v. The Queen***, [1979] 1 SCR 984 (SCC) **(Appellant's Book of Authorities Tab 4)**
> ***McKay v. Regina***, [1980] 2 SCR 370 (SCC) **(Appellant's Book of Authorities Tab 9)**

2. In addition to the procedural similarities with criminal trials, Disciplinary Court proceedings deal with similar substantive matters. In particular, the Appellant is charged with assault or threatening to assault, actions which are offences under the ***Criminal Code***. Similar defences are available in Disciplinary Court as are available in the criminal courts. For example, the Appellant may be entitled to rely on self-defence in Disciplinary Court just as he could in criminal court. Other disciplinary offences raise significant legal issues of criminal jurisprudence, e.g., the legal definition of possession, the determination of whether the offence requires *mens rea*, or imposes strict of absolute liability. A detailed discussion of these issues is contained in Professor Jackson's article in the University of British Columbia Law Review (supra)

> **The Right to Counsel in Prison Disciplinary Hearings**, Michael Jackson, 1986 20 U.B.C. Law Review, pp. 252-265

3. The Appellant says that the substantive and procedural similarities between Disciplinary Court and criminal court hearings support the proposition that Disciplinary Court proceedings are "criminal proceedings" within the meaning of s. 3(2)(a) of the ***Legal Services Society Act***.

**The Right to Counsel – Illusion or Reality?**

4. The ***Corrections and Conditional Release Act*** grants prisoners the right to have counsel appear with them at Disciplinary Court hearings. The right becomes illusory if legal aid is not available to them. Institutional officials might determine that they are unlikely to get a conviction for the assault charge in outside Court on a charge pursuant to the ***Criminal Code***, particularly if the prisoner is represented by counsel, either privately or on legal aid. For that reason the official may determine that the charge should be proceeded with inside under the ***Corrections and Conditional Release Act*** and ***Regulations***, knowing that the individual has insufficient funds to retain private counsel and that legal aid will not cover the Disciplinary Court proceedings. This calculation would permit institutional officials to avoid the skills that competent counsel can bring to trial proceedings and ensure that they have a better chance of conviction when the prisoners is unrepresented by counsel.

> ***Corrections and Conditional Release Act Regulations***, SOR/92-620, 31(2) and 97 **(Appellant's Book of Authorities Tab 22)**

5. The implications of the ***Landry*** decision and its affirmation by the British Columbia Court of

Appeal in this case have been described in this way:

> A number of consequences have been flowing from the fact that prisoners have an acknowledged right to counsel but there is no reciprocal obligation on the part of the Legal Services Society to provide it. Prisoners ineligible for legal aid have been forced to cast around in an attempt to find lawyers who will represent them based upon some moral obligation flowing from having been their counsel during a criminal trial, or on the basis of a future promise to pay when they are released. This has resulted in prisoners coming to the disciplinary hearing and requesting adjournments in order to consult with counsel almost as a matter of course and having to make further application when their initial approaches do not yield positive results. These requests for adjournment, coupled with the institution's requests based on co-ordinating the hearing with witnesses' work schedules have resulted in inordinately long delays before final adjudication.
>
> The result is a shared sense of frustration among everyone involved in the process. The prisoner is frustrated by the right he is said to have but cannot realize; the staff is frustrated by what they see as the games prisoners play in seeking adjournments; the warden and his senior administrators in not having disciplinary problems resolved quickly; and the independent chairpersons who know that their decisions rendered in the absence of counsel may be vulnerable to judicial nullification.
>
> **The Right to Counsel in Prison Disciplinary Hearings**, Michael Jackson, 1986 20 U.B.C. Law Review, pp. 281-282

6. The frustration of prisoners, guaranteed the right to counsel in the ***Corrections and Conditional Release Act***, but denied its benefits by the interpretation of the British Columbia Court of Appeal in ***Landry***, is compounded by the limited educational and social skills of prisoners and the mental health problems that many of them face. Prisoners can be persons most in need of assistance because of their limited education, learning disabilities, and poor communication skills. They are also more vulnerable to abuses of power and non-compliance with the Rule of Law due to their limited access to the outside world, including access to counsel and the media to ensure public accountability by the prison administration.

7. In his remarks to the 1994 Parliamentary Committee on Justice and the Solicitor General, the then Commissioner of the Correctional Service of Canada pointed out that the federal offender population is comprised of persons with the following characteristics:

(a) nearly one in ten have suffered from a serious mental disorder;

(b) 70% have substance abuse problems;

(c) 65% are functionally illiterate;

(d) the majority are school drop outs;

(e) most have not held regular employment; and

(f) most have experienced a life of alienation and failure.

**Opening Remarks for John Edwards Commissioner of the Correctional Service of Canada at the Parliamentary Committee on Justice and Solicitor General on Main Estimates, Tuesday, April 26, 1994 (Appellant's Book of Authorities Tab 29)**

1. The academic literature describes how these factors affect the fairness of disciplinary proceedings carried out without the benefit of the assistance of counsel and undermines prisoner's respect for the Rule of Law.

**The Right to Counsel in Prison Disciplinary Hearings**, Michael Jackson, 1986 20 U.B.C. Law Review, and see in particular the two case studies *Peters* and *Redwood* at pp.242-250

**Conclusion**

2. The "prisoners exception" that has been carved out of the law governing s. 3(2) lacks a sound legal foundation, is unprincipled and unreasonable as well as arbitrary and unfair. An individual's status as a federal prisoner should not in itself result in the denial of a benefit conferred by provincial statute on all others.

***Rizzo & Rizzo (supra)*** para 27

3. In the 1977 Report of the Parliamentary Sub-Committee on the Penitentiary System in Canada, chaired by the late, the Honourable Mark MacGuigan (as he then was), the following statements about imprisonment in Canada appear:

> The most individually destructive, psychologically crippling and socially alienating experience that could conceivably exist within the borders of the country. (p.752)
>
> There is a great deal of irony in the fact that imprisonment...the ultimate product of our system of criminal justice itself epitomizes injustice. (p.411)
>
> **Sub-Committee on the Penitentiary System in Canada. (1977) *Report to Parliament. (MacGuigan Report)*.** Ottawa: Ministry of Supply and Services Canada. **(Appellant's Book of Authorities Tab 32)**

4. In the 1996 Report of the Commission of Inquiry into Certain Events at the Prison for Women in Kingston (the Arbour Report), the Commissioner, the Honourable Louise Arbour (as she then was), not only repeated the above quotations, but found them to be equally applicable in 1996. She concluded that her Inquiry "...revealed a disturbing lack of commitment to the ideals of justice on the part of the Correc-

tional Service", and singled out the management of segregation as one of two areas in which the Service was most delinquent.

5. She called for the development of a culture of rights to overcome this breakdown of the Rule of Law in Corrections and recommended, among other things, the importation and integration of the Rule of Law at the prison management level, both within the prison and at regional and national levels, from the other partners in the criminal justice enterprise, namely the police, the Bar and the judiciary, noting that there was no evidence that it would emerge spontaneously.

6. The Commissioner called for a strong effort to be made "to bring home to all the participants in the Correctional enterprise the need to yield to the external power of Parliament and of the courts, and to join in the legal order that binds the other branches of the criminal justice system". She pointed to the obvious difficulty at all levels of the Correctional Service of Canada in appreciating the need to both obey the spirit and the letter of the law and recommended more cross fertilisation between the Correctional Service and other branches of the criminal justice system and the development of a program of initial and continuing education for correctional officers which will emphasise the supremacy of the ***Canadian Charter of Rights and Freedoms*** and the fact that all authority comes from the law.

7. The report concluded that there was nothing to suggest that the Correctional Service of Canada was either willing or able to reform without judicial guidance and control. As the Report notes: "The Rule of Law is absent, although rules are everywhere".

> **Commission of Inquiry into Certain Events at the Prison for Women in Kingston** The Honourable Louise Arbour Commissioner **(Appellant's Book of Authorities Tab 28)**
> **Scrutiny from the Outside: The Arbour Commission, the Prison for Women and Correctional Service of Canada,** Allan Manson (1997) 1 Can. Crim. L.R.

8. It is respectfully submitted that this Court's statutory interpretation of the provisions of the ***Legal Services Society Act*** of British Columbia in issue on this appeal, will be of fundamental importance to the issue of respect for the law and will greatly affect the entire legitimacy of prison justice.

9. On the issue of costs, the Appellant seeks his costs here and in all Courts below on a solicitor/client basis and not on the basis of the tariff of the Legal Services Society of British Columbia, because this is a test case, not funded by the Legal Services Society of British Columbia. The Appellant asks that costs be taxed by the Registrar of the Supreme Court of Canada on a solicitor/client basis.

## PART IV

## NATURE OF ORDER REQUESTED

10. That the appeal be allowed and an order made declaring that the Respondent Legal Services Society of British Columbia is required to ensure that the Appellant is afforded legal services of the kind ordinarily provided by a lawyer at his prison Disciplinary Court hearing because he is a qualifying individual who meets the criteria set out in s.3(2)(a) or (b) of the *Legal Services Society Act*, plus the costs of all proceedings in this Court and in all Courts below on a solicitor/client basis.

11. All of which is respectfully submitted.

Solicitors for the Appellant
Conroy and Company

_____

John W. Conroy, Q.C.
Counsel for the Arthur Winters,
Appellant

## PART V

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*R. v. Hull Prison Board of Visitors: Ex parte St. Germaine*
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*R. v. Shubley*
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*Re Mountain and Legal Services Society*
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*Rosenbaum v. Law Society of Manitoba*
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*Solosky v. The Queen*
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*Winters v. Legal Services Society*
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*Winters v. Legal Services Society*
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B. STATUTORY AUTHORITIES

*Corrections and Conditional Release Act*
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*Corrections and Conditional Release Act Regulations*

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*Criminal Code of Canada*
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*Penitentiary Service Regulations*
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*Commission of Inquiry into Certain Events at the Prison for Women in Kingston*
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(1983), University of Toronto Press, by Professor Michael Jackson. . . . . 12

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NOTICE TO THE RESPONDENT: Pursuant to subsection 44(1) of the ***Rules of the Supreme Court of Canada***, this appeal will be inscribed by the Registrar for hearing after the respondent's factum has been filed or on the expiration of the time period set out in paragraph 38(3)(*b*) of the said Rules, as the case may be.