

**Smith v. Jones**  
[1999] 1 SCR 455

Lamer CJ and L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci, Major, Bastarache, and Binnie JJ.

APPEAL from a judgment of the British Columbia Court of Appeal, [1998] BCJ No. 3182 (QL), allowing in part the accused's appeal from a judgment of Henderson J ordering a psychiatrist to disclose his report to the Crown. Appeal dismissed, Lamer CJ and Major and Binnie JJ dissenting.

The reasons of Lamer CJ and Major and Binnie JJ were delivered by :

MAJOR J (dissenting):

**I. Introduction**

[1] I agree with Justice Cory's summation of the facts giving rise to this appeal and with his conclusion that the confidentiality of the solicitor–client privilege must, in exceptional circumstances of public safety, yield to the public good.

[2] The point of departure arises in the restriction each of us places on the scope of disclosure.

[3] In my opinion a limited exception which does not include conscriptive evidence against the accused would address the immediate concern for public safety in this appeal while respecting the importance of the privilege. I do not read Cory J's reasons as imposing that limitation.

[4] This approach will in my view foster a climate in which dangerous individuals are more likely to disclose their disorders, seek treatment and pose less danger to the public ... .

[30] The public interest in cases such as this is twofold, and requires not only that the dangerous individual is prevented from harming anyone, but that they obtain treatment if needed. Appealing as it might be to force individuals in Mr. Jones's position into treatment through the criminal process, it is unlikely to happen. If there is a risk that conscriptive evidence from the mouth of the accused can be used against him, the defence bar is going to be reluctant to refer dangerous clients to the care of experts. Disclosure will be discouraged and treatment will not occur.

[31] As the facts of this case illustrate, Mr. Jones was only diagnosed and made aware of the possibility of treatment because he felt secure in confiding to Dr. Smith. If that confidence is undermined, then these individuals will not disclose the danger they pose, they will not be identified, and public safety will suffer.

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[35] CORY J ( Majority): The solicitor–client privilege permits a client to talk freely to his or her lawyer secure in the knowledge that the words and documents which fall within the scope of the privilege will not be disclosed. It has long been recognized that this principle is of fundamental importance to the administration of justice and to the extent it is feasible, it should

be maintained. Yet when public safety is involved and death or serious bodily harm is imminent, the privilege should be set aside. This appeal must determine what circumstances and factors should be considered and weighed in determining whether solicitor–client privilege should be set aside in the interest of protecting the safety of the public.

### **I. Factual Background**

[36] Solicitor–client privilege is claimed for a doctor's report. Pending the resolution of that claim the names of the parties involved have been replaced by pseudonyms. The appellant, "James Jones," was charged with aggravated sexual assault of a prostitute. His counsel referred him to a psychiatrist, the respondent, "John Smith," for a forensic psychiatric assessment. It was hoped that it would be of assistance in the preparation of the defence or with submissions on sentencing in the event of a guilty plea. His counsel advised Mr. Jones that the consultation was privileged in the same way as a consultation with him would be. Dr. Smith interviewed Mr. Jones for 90 minutes on July 30, 1997. His findings are contained in an affidavit he submitted to the judge of first instance. They set out the basis for his belief that Mr. Jones poses a continuing danger to the public.

[37] Dr. Smith reported that Mr. Jones described in considerable detail his plan for the crime to which he subsequently pled guilty. It involved deliberately choosing as a victim a small prostitute who could be readily overwhelmed. He planned to have sex with her and then to kidnap her. He took duct tape and rope with him, as well as a small blue ball that he tried to force into the woman's mouth. Because he planned to kill her after the sexual assault he made no attempt to hide his identity.

[38] Mr. Jones planned to strangle the victim and to dispose of her body in the bush area near Hope, British Columbia. He was going to shoot the woman in the face before burying her to impede identification. He had arranged time off from his work and had carefully prepared his basement apartment to facilitate his planned sexual assault and murder. He had told people he would be going away on vacation so that no one would visit him and he had fixed dead bolts on all the doors so that a key alone would not open them.

[39] Mr. Jones told Dr. Smith that his first victim would be a "trial run" to see if he could "live with" what he had done. If he could, he planned to seek out similar victims. He stated that, by the time he had kidnapped his first victim, he expected that he would be "in so deep" that he would have no choice but to carry out his plans.

[40] On July 31, Dr. Smith telephoned Mr. Jones's counsel and informed him that in his opinion Mr. Jones was a dangerous individual who would, more likely than not, commit future offences unless he received sufficient treatment.

[41] On September 24, 1997, Mr. Jones pled guilty to aggravated assault and the matter was put over for sentencing. Sometime after November 19, Dr. Smith phoned Mr. Jones's counsel to inquire about the proceedings. On learning that the judge would not be advised of his concerns, Dr. Smith indicated that he intended to seek legal advice and shortly thereafter commenced this action.

[42] The *in camera* hearing took place in December 1997. Dr. Smith filed an affidavit describing his interview with Mr. Jones and his opinion based upon the interview. Mr. Jones

filed an affidavit in response. On December 12, 1997, Henderson J ruled that the public safety exception to the law of solicitor–client privilege and doctor-patient confidentiality released Dr. Smith from his duties of confidentiality. He went on to rule that Dr. Smith was under a duty to disclose to the police and the Crown both the statements made by Mr. Jones and his opinion based upon them. Henderson J ordered a stay of his order to allow for an appeal and Mr. Jones promptly appealed the decision.

[43] The Court of Appeal allowed the appeal but only to the extent that the mandatory order was changed to one permitting Dr. Smith to disclose the information to the Crown and police: [1998] BCJ No. 3182 (QL). The order was stayed to permit Mr. Jones to consider a further appeal. It also directed that pseudonyms be used, that proceedings be heard *in camera* and that the file remain sealed pending further order. This order is discussed in greater detail below. The sentencing of Mr. Jones on the aggravated assault charge was adjourned pending the outcome of this appeal.

## II. Analysis

### A. *The Nature of the Solicitor–Client Privilege*

[44] Both parties made their submissions on the basis that the psychiatrist's report was protected by solicitor–client privilege, and it should be considered on that basis. It is the highest privilege recognized by the courts. By necessary implication, if a public safety exception applies to solicitor–client privilege, it applies to all classifications of privileges and duties of confidentiality. It follows that, in these reasons, it is not necessary to consider any distinctions that may exist between a solicitor–client privilege and a litigation privilege.

[45] The solicitor–client privilege has long been regarded as fundamentally important to our judicial system. Well over a century ago in *Anderson v. Bank of British Columbia* (1876), 2 Ch.D 644 (CA), at p. 649, the importance of the rule was recognized:

The object and meaning of the rule is this: that as, by reason of the complexity and difficulty of our law, litigation can only be properly conducted by professional men, it is absolutely necessary that a man, in order to prosecute his rights or to defend himself from an improper claim, should have recourse to the assistance of professional lawyers, ... to use a vulgar phrase, that he should be able to make a clean breast of it to the gentleman whom he consults with a view to the prosecution of his claim, or the substantiating of his defence ... that he should be able to place unrestricted and unbounded confidence in the professional agent, and that the communications he so makes to him should be kept secret, unless with his consent (for it is his privilege, and not the privilege of the confidential agent), that he should be enabled properly to conduct his litigation.

[46] Clients seeking advice must be able to speak freely to their lawyers secure in the knowledge that what they say will not be divulged without their consent. It cannot be forgotten that the privilege is that of the client, not the lawyer. The privilege is essential if sound legal advice is to be given in every field. It has a deep significance in almost every situation where legal advice is sought whether it be with regard to corporate and commercial transactions, to family relationships, to civil litigation or to criminal charges. Family secrets, company secrets, personal foibles and indiscretions all must on occasion be revealed to the lawyer by the client. Without this privilege clients could never be candid and furnish all the relevant information that

must be provided to lawyers if they are to properly advise their clients. It is an element that is both integral and extremely important to the functioning of the legal system. It is because of the fundamental importance of the privilege that the onus properly rests upon those seeking to set aside the privilege to justify taking such a significant step.

[47] As Lamer CJ stated in *R v. Gruenke*, [1991] 3 SCR 263, at p. 289:

The *prima facie* protection for solicitor–client communications is based on the fact that the relationship and the communications between solicitor and client are essential to the effective operation of the legal system. Such communications are inextricably linked with the very system which desires the disclosure of the communication.

[48] The solicitor–client privilege was originally simply a rule of evidence, protecting communications only to the extent that a solicitor could not be forced to testify. Yet now it has evolved into a substantive rule. As Dickson J (as he then was) wrote in *Solosky v. The Queen*, [1980] 1 SCR 821, at p. 836, "Recent case law has taken the traditional doctrine of privilege and placed it on a new plane. Privilege is no longer regarded merely as a rule of evidence which acts as a shield to prevent privileged materials from being tendered in evidence in a court room."

[49] Lamer J (as he then was) expanded on this statement in *Descôteaux v. Mierzwinski*, [1982] 1 SCR 860, at p. 875, when he discussed the content of this substantive rule:

It is quite apparent that the Court in [*Solosky*] applied a standard that has nothing to do with the rule of evidence, the privilege, since there was never any question of testimony before a tribunal or court. The Court in fact, in my view, applied a substantive rule, without actually formulating it, and, consequently, recognized implicitly that the right to confidentiality, which had long ago given rise to a rule of evidence, had also since given rise to a substantive rule.

It would, I think, be useful for us to formulate this substantive rule, as the judges formerly did with the rule of evidence; it could, in my view, be stated as follows:

1. The confidentiality of the communications between solicitor and client may be raised in any circumstances where such communications are likely to be disclosed without the client's consent.
2. Unless the law provides otherwise, when and to the extent that the legitimate exercise of a right would interfere with another person's right to have his communications with his lawyer kept confidential, the resulting conflict should be resolved in favour of protecting the confidentiality.
3. When the law gives someone the authority to do something which, in the circumstances of the case, might interfere with that confidentiality, the decision to do so and the choice of means of exercising that authority should be determined with a view to not interfering with it except to the extent absolutely necessary in order to achieve the ends sought by the enabling legislation.
4. Acts providing otherwise in situations under paragraph 2 and enabling legislation referred to in paragraph 3 must be interpreted restrictively.

[50] As the British Columbia Court of Appeal observed, solicitor–client privilege is the privilege "which the law has been most zealous to protect and most reluctant to water down by exceptions." Quite simply it is a principle of fundamental importance to the administration of justice.

### ***B. Limitations on Solicitor–Client Privilege***

[51] Just as no right is absolute so too the privilege, even that between solicitor and client, is subject to clearly defined exceptions. **The decision to exclude evidence that would be both relevant and of substantial probative value because it is protected by the solicitor–client privilege represents a policy decision.** It is based upon the importance to our legal system in general of the solicitor–client privilege. In certain circumstances, however, other societal values must prevail.

#### *(1) Innocence of the Accused*

[52] One exception to solicitor–client privilege was set out in *R v. Dunbar and Logan* (1982), 68 CCC (2d) 13 (Ont. CA). Martin JA, speaking for the court, ruled that solicitor–client privilege must yield to the right of accused persons to fully defend themselves. At p. 44 he wrote:

No rule of policy requires the continued existence of the privilege in criminal cases when the person claiming the privilege no longer has any interest to protect, and when maintaining the privilege might screen from the jury information which would assist an accused.

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#### *(2) Criminal Communications*

[55] A second exception to solicitor–client privilege was set out in *Descôteaux v. Mierzwinski*, supra. Lamer J for the Court, held that communications that are criminal in themselves (in this case, a fraudulent legal aid application) or that are intended to obtain legal advice to facilitate criminal activities are not privileged. At p. 893 this appears:

There are certain exceptions to the principle of the confidentiality of solicitor–client communications, however. Thus communications that are in themselves criminal or that are made with a view to obtaining legal advice to facilitate the commission of a crime will not be privileged, *inter alia*.

#### *(3) The Public Safety Exception*

[56] In *Solosky*, supra, an inmate in a federal penitentiary asked this Court to make a declaration that all properly identified correspondence between solicitors and clients would be forwarded to their destinations without being opened. The inmates' privilege was in conflict with the *Penitentiary Act*, RSC 1970, c. P-6, and with Regulation 2.18 of the *Penitentiary Service Regulations*, which allowed the institution's director to censor any correspondence to the extent the censor considered necessary.

[57] In his decision, Dickson J ruled that the inmates' privilege must yield when the safety of members of the institution is at risk. In his reasons at p. 840, he implicitly limited the solicitor–client privilege. He wrote:

The result, as I see it, is that the Court is placed in the position of having to balance the public interest in maintaining the safety and security of a penal institution, its staff and its inmates, with the interest represented by insulating the solicitor–client relationship. Even giving full recognition to the right of an inmate to correspond freely with his legal adviser, and the need for minimum derogation therefrom, *the scale must ultimately come down in favour of the public interest.* [Emphasis added.]

In certain circumstances, therefore, when the safety of the public is at risk the solicitor–client privilege may be set aside.

[58] Courts in other jurisdictions have considered the issue of public safety exceptions to privilege, particularly in doctor–patient relationships. Obviously these cases do not deal with solicitor–client privilege. However, they do support the position that other privileges are subject to the public interest. Moreover, they assist in determining the approach that should be taken to the consideration of the issue of privilege. Further these cases are useful in exploring certain issues that arise in this case, for example, how the victim class can be identified and how specific the potential victim or class of victims must be.

[59] I would emphasize that these cases are not being examined with a view to establishing a tort duty on doctors to disclose confidential information when a public safety concern arises. That issue is not before the Court and must not be decided without a factual background and the benefit of argument.

(a) American Decisions

[60] In *Tarasoff v. Regents of University of California*, 551 P.2d 334 (1976), the Supreme Court of California considered whether psychologists and psychiatrists have a duty to warn a potential victim when they were or should have been aware that a patient presented a serious danger to an identifiable person.

[61] In that case a patient under the care of the respondents, a psychologist and two psychiatrists employed by the University of California, confessed to his psychologist his intention to kill a young girl, who was readily identifiable from his description. The psychologist contacted the police who questioned and briefly detained the patient but released him because he appeared rational. Two months later, the patient killed the girl. Her parents brought an action against the therapists for failure to warn them of the danger to their daughter.

[62] Tobriner J of the California Supreme Court at p. 340 wrote:

When a therapist determines, or pursuant to the standards of his profession should determine, that his patient presents a serious danger of violence to another, he incurs an obligation to use reasonable care to protect the intended victim against such danger. The discharge of this duty may require the therapist to take one or more of various steps, depending upon the nature of the case. Thus it may call for him to warn the intended

victim or others likely to apprise the victim of the danger, to notify the police, or to take whatever other steps are reasonably necessary under the circumstances.

[63] He went on to observe that the public interest in maintaining access to mental health treatment had to be balanced against the public interest in safety. At p. 346:

We recognize the public interest in supporting effective treatment of mental illness and in protecting the rights of patients to privacy . . . , and the consequent public importance of safeguarding the confidential character of psychotherapeutic communication. Against this interest, however, we must weigh the public interest in safety from violent assault. [Citation omitted.]

At p. 347, he concluded:

We conclude that the public policy favoring protection of the confidential character of patient-psychotherapist communications must yield to the extent to which disclosure is essential to avert danger to others. *The protective privilege ends where the public peril begins.* [Emphasis added.]

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#### (b) United Kingdom Decisions

[69] The leading case in the United Kingdom on balancing the duty of confidentiality and the duty to disclose is *W. v. Egdell*, [1990] 1 All ER 835 (CA). Although the facts differ somewhat from this case, enough similarities exist to make the reasoning set out in the two concurring judgments helpful to the considerations that must be given to the case at bar. In that case W. pled guilty to manslaughter after committing a series of killings. As a result of a finding of diminished responsibility he was confined to a mental institution. Ten years later, he applied pursuant to the appropriate regulations for a conditional discharge, or a transfer to a regional secure unit. To this end, through his solicitors, W. consulted Dr. Egdell, a psychiatrist, who was to report on his mental state. His report did not support W.'s application for transfer. Rather he expressed grave concerns regarding W.'s lack of remorse and his continuing interest in homemade bombs and fireworks. As a result, W. withdrew his application.

[70] Shortly thereafter, Dr. Egdell telephoned the tribunal that was to review W.'s application to ask whether it had received a copy of his report. He learned that it had not and that the application had been withdrawn. He telephoned W.'s solicitors for permission to forward his report to the assistant medical director of the hospital in which W. was incarcerated and was refused. Nonetheless, Dr. Egdell forwarded his report to the hospital, which then forwarded it to the Home Office. Both of these copies were sent without W.'s permission or knowledge.

[71] By chance, several days later W.'s file was due for a three-year review under the *Mental Health Act*. It was then that his solicitors learned that Dr. Egdell's report had been forwarded to the hospital. W. began proceedings, seeking an injunction to prevent the mental health review tribunal from disclosing or considering Dr. Egdell's report, for the delivery of all copies of the report to him, and for damages for breach of the duty of confidence.

[72] In their concurring judgments, Sir Stephen Brown P and Bingham LJ affirmed the trial judge's ruling dismissing W.'s suit. Bingham LJ said at p. 848, "[T]he law treats such duties [of confidentiality] not as absolute but as liable to be overridden where there is held to be a stronger public interest in disclosure." ... Sir Stephen Brown P wrote at p. 846:

The balance of public interest clearly lay in the restricted disclosure of vital information to the director of the hospital and to the Secretary of State who had the onerous duty of safeguarding public safety.

In this case the number and nature of the killings by W must inevitably give rise to the gravest concern for the safety of the public.

[73] In the United Kingdom the duty on a doctor not to disclose is never absolute. Further, the duty to disclose must be evaluated in the context of the existing circumstances and the specific facts presented.

### ***C. The Public Safety Exception and Solicitor–Client Privilege***

[74] The foregoing review makes it clear that even the fundamentally important right to confidentiality is not absolute in doctor-patient relationships, and it cannot be absolute in solicitor–client relationships: *Solosky*, supra. When the interest in the protection of the innocent accused and the safety of members of the public is engaged, the privilege will have to be balanced against these other compelling public needs. In rare circumstances, these public interests may be so compelling that the privilege must be displaced. Yet the right to privacy in a solicitor–client relationship is so fundamentally important that only a compelling public interest may justify setting aside solicitor–client privilege.

[75] Danger to public safety can, in appropriate circumstances, provide the requisite justification. It is significant that public safety exceptions to the solicitor–client privilege are recognized by all professional legal bodies within Canada. See, for example, chapter 5, s. 12, of the British Columbia *Professional Conduct Handbook*:

#### DISCLOSURE TO PREVENT A CRIME

**12. A lawyer may disclose information received as a result of a solicitor–client relationship if the lawyer has reasonable grounds to believe that the disclosure is necessary to prevent a crime involving death or serious bodily harm to any person.**

See as well the even broader Rule 4.11 of the Law Society of Upper Canada's *Professional Conduct Handbook*.

[76] Quite simply society recognizes that the safety of the public is of such importance that in appropriate circumstances it will warrant setting aside solicitor–client privilege. What factors should be taken into consideration in determining whether that privilege should be displaced?

(1) *Determining When Public Safety Outweighs Solicitor–Client Privilege*

[77] There are three factors to be considered: First, is there a clear risk to an identifiable person or group of persons? Second, is there a risk of serious bodily harm or death? Third, is the danger imminent? Clearly if the risk is imminent, the danger is serious.

[78] These factors will often overlap and vary in their importance and significance. The weight to be attached to each will vary with the circumstances presented by each case, but they all must be considered. As well, each factor is composed of various aspects, and, like the factors themselves, these aspects may overlap and the weight to be given to them will vary depending on the circumstances of each case. Yet as a general rule, if the privilege is to be set aside the court must find that there is an imminent risk of serious bodily harm or death to an identifiable person or group.

(a) Clarity

[79] What should be considered in determining if there is a clear risk to an identifiable group or person? It will be appropriate and relevant to consider the answers a particular case may provide to the following questions: Is there evidence of long range planning? Has a method for effecting the specific attack been suggested? Is there a prior history of violence or threats of violence? Are the prior assaults or threats of violence similar to that which was planned? If there is a history of violence, has the violence increased in severity? Is the violence directed to an identifiable person or group of persons? This is not an all-encompassing list. It is important to note, however, that as a general rule a group or person must be ascertainable. The requisite specificity of that identification will vary depending on the other factors discussed here.

[80] The specific questions to be considered under this heading will vary with the particular circumstances of each case. Great significance might, in some situations, be given to the particularly clear identification of a particular individual or group of intended victims. Even if the group of intended victims is large considerable significance can be given to the threat if the identification of the group is clear and forceful. For example, a threat, put forward with chilling detail, to kill or seriously injure children five years of age and under would have to be given very careful consideration. In certain circumstances it might be that a threat of death directed toward single women living in apartment buildings could in combination with other factors be sufficient in the particular circumstances to justify setting aside the privilege. At the same time, a general threat of death or violence directed to everyone in a city or community, or anyone with whom the person may come into contact, may be too vague to warrant setting aside the privilege. However, if the threatened harm to the members of the public was particularly compelling, extremely serious and imminent, it might well be appropriate to lift the privilege. See in this regard *Egdell*, supra. All the surrounding circumstances will have to be taken into consideration in every case.

[81] In sum, the threatened group may be large but if it is clearly identifiable then it is a factor—indeed an essential factor—that must be considered together with others in determining whether the solicitor–client privilege should be set aside. A test that requires that the class of victim be ascertainable allows the trial judge sufficient flexibility to determine whether the public safety exception has been made out.

(b) Seriousness

[82] The "seriousness" factor requires that the threat be such that the intended victim is in danger of being killed or of suffering serious bodily harm. Many persons involved in criminal justice proceedings will have committed prior crimes or may be planning to commit crimes in the future. The disclosure of planned future crimes without an element of violence would be an insufficient reason to set aside solicitor–client privilege because of fears for public safety. For the public safety interest to be of sufficient importance to displace solicitor–client privilege, the threat must be to occasion serious bodily harm or death.

[83] It should be observed that serious psychological harm may constitute serious bodily harm, as this Court held in *R v. McCraw*, [1991] 3 SCR 72, at p. 81:

So long as the psychological harm substantially interferes with the health or well-being of the complainant, it properly comes within the scope of the phrase "serious bodily harm." There can be no doubt that psychological harm may often be more pervasive and permanent in its effect than any physical harm.

(c) Imminence

[84] **The risk of serious bodily harm or death must be imminent if solicitor–client communications are to be disclosed.** That is, the risk itself must be serious: a serious risk of serious bodily harm. The nature of the threat must be such that it creates a sense of urgency. This sense of urgency may be applicable to some time in the future. Depending on the seriousness and clarity of the threat, it will not always be necessary to impose a particular time limit on the risk. It is sufficient if there is a clear and imminent threat of serious bodily harm to an identifiable group, and if this threat is made in such a manner that a sense of urgency is created. A statement made in a fleeting fit of anger will usually be insufficient to disturb the solicitor–client privilege. On the other hand, imminence as a factor may be satisfied if a person makes a clear threat to kill someone that he vows to carry out three years hence when he is released from prison. If that threat is made with such chilling intensity and graphic detail that a reasonable bystander would be convinced that the killing would be carried out the threat could be considered to be imminent. Imminence, like the other two criteria, must be defined in the context of each situation.

[85] In summary, solicitor–client privilege should only be set aside in situations where the facts raise real concerns that an identifiable individual or group is in imminent danger of death or serious bodily harm. The facts must be carefully considered to determine whether the three factors of seriousness, clarity, and imminence indicate that the privilege cannot be maintained. Different weights will be given to each factor in any particular case. If after considering all appropriate factors it is determined that the threat to public safety outweighs the need to preserve solicitor–client privilege, then the privilege must be set aside. When it is, the disclosure should be limited so that it includes only the information necessary to protect public safety. See in this respect *Descôteaux*, supra, at p. 891.

(2) *Extent of Disclosure*

[86] The disclosure of the privileged communication should generally be limited as much as possible. The judge setting aside the solicitor–client privilege should strive to strictly limit disclosure to those aspects of the report or document which indicate that there is an imminent

risk of serious bodily harm or death to an identifiable person or group. In undertaking this task consideration should be given to those portions of the report which refer to the risk of serious harm to an identifiable group; that the risk is serious in that it involves a danger of death or serious bodily harm; and that the serious risk is imminent in the sense given to that word in para. 84 above. The requirement that the disclosure be limited must be emphasized. For example, if a report contained references to criminal behaviour that did not have an imminent risk of serious bodily harm but disclosed, for example, the commission of crimes of fraud, counterfeiting or the sale of stolen goods, those references would necessarily be deleted.

***D. Application of the Public Safety Exception to Solicitor–Client Privilege to the Case at Bar***

*(1) Clarity*

[87] Would a reasonable observer, given all the facts for which solicitor–client privilege is sought, consider the potential danger posed by Mr. Jones to be clear, serious, and imminent? The answer must, I think, be in the affirmative. According to Dr. Smith's affidavit, the plan described by Mr. Jones demonstrated a number of the factors that should be considered in determining the clarity of the potential danger. They are the clear identification of the victim group, the specificity of method, the evidence of planning, and the prior attempted or actual acts that mirror the potential act of threatened future harm.

[88] **It is apparent that Mr. Jones had planned in considerable detail attacks on prostitutes on Vancouver's Downtown Eastside. He had gathered materials together that he planned to use to achieve his ultimate goal of forcing a prostitute to become his "sex slave" before killing her. He had arranged for vacation time from his job and had modified his basement apartment to ensure that no one else could enter. Mr. Jones had proceeded so far as to take rope and duct tape with him and had planned to shoot the intended victim in the face to obliterate her identity. Perhaps most important, he had called the initial assault to which he pled guilty a "trial run."** These factors should be considered together with Dr. Smith's diagnosis of Mr. Jones, namely that he suffered a paraphiliac disorder with multiple paraphilias (in particular, sexual sadism), personality disorder with mixed features, and some antisocial features and drug abuse difficulty. The original planning and the prior attack on a prostitute emphasize the potential risk of serious bodily harm or death to prostitutes in the Downtown Eastside of Vancouver.

[89] **Although Mr. Jones attempted to explain his failure to seek treatment for fear of a longer sentence and the danger he would be exposed to in prison, this does not affect the gravity of the threatened attack on prostitutes.** The combination of the factors referred to in the paragraph above meets the standard of clarity necessary to set aside solicitor–client privilege. The potential victim or group of victims is identifiable. Mr. Jones had already acted once in committing the crime for which he is waiting to be sentenced. It is clear that he intended to act again. The risk of serious bodily harm or death was readily apparent and the group of victims was readily identifiable. The harm potentially caused was of the utmost gravity.

(2) *Seriousness*

[90] The seriousness of the potential harm, a sexually sadistic murder, is clearly sufficient. The fact that Mr. Jones has after careful and detailed planning already committed an assault upon a prostitute supports the finding that the potential harm caused would be extremely serious.

(3) *Imminence*

[91] The most difficult issue to resolve is whether the risk of serious bodily harm can be termed "imminent." Mr. Jones was arrested on September 17, 1996, for the assault he had committed three days earlier. He consulted Dr. Smith on July 30, 1997. Dr. Smith contacted Mr. Jones's counsel the following day to inform him that, in Dr. Smith's opinion, Mr. Jones was a dangerous individual. About three months later, some 14 months after Mr. Jones's arrest, Dr. Smith telephoned Mr. Jones's counsel again and learned that his (Dr. Smith's) concerns would not be addressed in the sentencing hearing. He then began these legal proceedings. Mr. Jones has been in custody since December 15, 1997, pursuant to the order of Henderson J. Mr. Jones was thus at liberty from September 14, 1996, to December 15, 1997, a period of almost 15 months. During that time he did not carry out his plan to attack and kill another prostitute. Moreover, Mr. Jones has not carried out a series of attacks over a period of time, which would lead to the conclusion that another attack was imminent. He has been charged and convicted of only one incident.

[92] No evidence was adduced as to whether Dr. Smith considered that a future attack was imminent. It is noteworthy that, first, he waited over three months to contact Mr. Jones's counsel. Second, there is no evidence that he believed it was probable Mr. Jones would commit a serious attack in the near future. Yet it must be remembered that Dr. Smith did take it upon himself to call Mr. Jones's counsel regarding the sentencing hearing. Even more significantly, Dr. Smith undertook these proceedings so that his report and opinion might be considered in the sentencing of Mr. Jones.

[93] There are two important factors that indicate that the threat of serious bodily harm was indeed imminent. First, Mr. Jones admitted that he had breached his bail conditions by continuing to visit the Downtown Eastside where he knew prostitutes could be found. Second, common sense would indicate that after Mr. Jones was arrested, and while he was awaiting sentence, he would have been acutely aware of the consequences of his actions. This is of particular significance in light of his fear of being attacked while he was in jail.

[94] Let us assume that the evidence as to imminence of the danger may not be as clear as might be desired. Nonetheless, there is some evidence of imminence. Furthermore, the other factors pertaining to clarity, the identifiable group of victims, and the chilling evidence of careful planning, when taken together, indicate that the solicitor–client privilege must be set aside for the protection of members of the public.

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***F. The Lifting of the Publication Ban***

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**III. Disposition**

[105] The file will be unsealed and the ban on the publication of the contents of the file is removed, except for those parts of the affidavit of the doctor which do not fall within the public safety exception. Subject to this direction the order of the British Columbia Court of Appeal is affirmed and this appeal is dismissed without costs.