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Docket: CA 169750

NOVA SCOTIA COURT OF APPEAL

[Cite as: Mitsui & Co.(Point Aconi) Ltd. v. Jones Power Co., 2001 NSCA 112]

Glube, C.J.N.S.; Hallett and Freeman, JJ.A.

BETWEEN:

JONES POWER CO. LIMITED, a body corporate,
and J.A. JONES CONSTRUCTION COMPANY, a
body corporate

Appellants

- and -

MITSUI & CO. (POINT ACONI) LTD., a body corporate

Respondent

REASONS FOR JUDGMENT

Counsel:	George W. MacDonald, Q.C. , A.H. Gaede, Jr. and Michelle C. Awad for the appellants T. Arthur Barry and Robert G. Grant, Q.C. for the respondent
Appeal Heard:	June 5, 2001
Judgment Delivered:	July 11, 2001
THE COURT:	Leave to appeal is granted and the appeal is allowed per reasons for judgment of Hallett, J.A.; Glube, C.J.N.S. and Freeman, J.A. concurring.

HALLETT, J.A.:

[1] This is an application for leave to appeal and, if granted, an appeal from an interlocutory decision and order of Justice Richard of the Supreme Court of Nova Scotia (the trial judge) dismissing the appellants' (Jones) application for: (i) an order for recusal of the trial judge from any further involvement in the management, hearing and/or resolution of matters in the action; and (ii) an order expunging from the record any and all decisions and/or comments made by the trial judge during a case management meeting on September 27, 2000, and in a Memorandum of Case Management Conference faxed to the parties from the office of the learned trial judge on or about October 3, 2000.

[2] Jones asserts that the trial judge prejudged issues which had yet to be brought before him and, as a result, Jones will not receive a fair hearing on those issues. Jones submits there is a reasonable apprehension of bias as the trial judge cannot, in view of his comments, be a neutral decision-maker. Jones asserts that the trial judge erred in refusing to recuse himself.

[3] In my opinion, the application for leave should be granted and an order made for the recusal of the trial judge as there is a reasonable apprehension of bias arising from comments he made in the fall of 2000. The trial judge made it clear at the September 27, 2000 case management meeting, in his Memorandum of that conference and confirmed in his recusal decision, that he had already decided that a memorandum of understanding (MOU) entered into between the parties on July 28, 1992 finalized all disputes that existed between the parties before that date. What the MOU meant, as is apparent from a review of the record of the proceedings, was not to be determined until evidence on that issue was adduced and submissions made by the parties at the second stage of the trial. Nevertheless, based on evidence presented at the severed trial, the trial judge subsequently made it clear to counsel that he had decided that the MOU had finalized all matters of dispute between the parties that had arisen prior to July 28, 1992.

[4] A review of the history of the proceedings is necessary to grasp how all of this came to be. Justice Cromwell of this Court in a decision dismissing Jones' appeal from the trial judge's decision that the MOU was legally binding on the parties did a careful review of the history of the proceedings which can be read in his decision reported at (2000), 189 N.S.R. (2d) 1. However, I will make a brief summary of facts that are relevant to this decision.

[5] The companies involved in this construction project were described by Cromwell, J.A. in § 3 and § 4 of his judgment as follows:

[3] Mitsui & Co. Ltd. ("Mitsui") is an international trading company based in Japan. J.A. Jones Construction Company ("Jones") is a U.S. Company. Its Energy Group builds power plants. Sargent & Lundy ("S & L") is an engineering firm based in Chicago specializing in the design and construction of power generating plants. Mitsui, Jones and S & L agreed to collaborate in order to qualify, propose, negotiate and perform all activities associated with the construction of a 165 MW thermal generating plant at Point Aconi, Cape Breton, for Nova Scotia Power.

[4] In October of 1989, Mitsui's wholly owned subsidiary, Mitsui & Co. (Canada) Ltd. contracted with Nova Scotia Power to build the plant. Jones and Mitsui then contracted for Jones to perform all of the civil, mechanical and electrical work including the installation of equipment to be supplied by Mitsui. This contract (Y - 4123) was entered into in August of 1990 between Mitsui & Co. (Point Aconi) Ltd. ("MPA") and Jones Power Co. Limited ("JPC"). Both companies were single purpose, wholly owned subsidiaries which were incorporated for the Point Aconi project. S & L were the design engineers. The contract price was $101,250,000 subject to adjustment as provided for under its terms. (For ease of reference, I will generally refer to the parties as "Jones" and "Mitsui" without distinguishing among the various corporate entities. Where such distinctions are essential to the issues on appeal, my references will be exact.)

[6] He also outlined the history of the disputes between the parties in § 5 to § 7 as follows:

[5] As construction proceeded, disputes arose between the parties which escalated and led to a significant deterioration of their relationship. Serious and high level intervention with the objective of resolving these disputes began in the spring of 1992. Detailed "position papers" were exchanged and meetings held. On July 28, 1992, a MOU, stated to be between Mitsui and JPC, was signed. Its stated purpose was "... to eliminate current misunderstandings that exist relative to Jones' compensation ... under the existing contract".

[6] Almost immediately after signing the MOU, Jones claimed the MOU omitted several items that had been agreed upon. By September of 1992, it claimed that the MOU had "... been officially and legally retracted". Both parties, however, recognized the importance of completing the contract with Nova Scotia Power. They therefore agreed, in November of 1992, to arrangements that would assure completion of the project on schedule without waiving their legal rights acquired to that time.

[7] The project was completed, but the disputes concerning Jones' compensation were not resolved. New disputes arose concerning the financing

arrangements which formed part of the November agreement. Actions by Mitsui against Jones and by Jones against Mitsui were commenced in 1994.

[7] From the start of litigation through to the fall of 1998, there were a number of case management conferences with the trial judge who, by agreement, was also the case management judge.

[8] In 1998 Mitsui applied to the trial judge to sever from the main trial the issue as to whether the MOU was legally binding on the parties as claimed by Mitsui. Jones took the position that the MOU was simply an agreement to agree and was too uncertain in its terms to be enforceable. The trial judge granted Mitsui's application for severance. An order was issued (the severance order) to give effect to his decision. The Order provided:

> 1. **THAT** the issue of whether or not the Memorandum of Understanding dated July 28, 1992 and executed by Mitsui & Co. (Point Aconi) Ltd. and Jones Power Company Limited constitutes a valid and legally binding agreement be tried before the trial in these proceedings;
>
> 2. **THAT** the evidence in the trial of this issue shall stand as evidence in the trial of these proceedings;
>
> 3. **THAT** that evidence adduced in the trial of this issue be confined to that relevant to the allegations contained in paragraphs 1, 2, 3, 4, 5,6,7,9,10, 13, 14, 16, 17, 18, 19 and 20 of the Statement of Claim in proceeding 1992 S.H. No. 109629 and paragraphs 1, 2, 3 and 14 of the defence of Jones Power Company Limited and J.A. Jones Construction Company in proceedings 1994 S.H. No. 109629; and
>
> 4. **THAT** the trial of this issue commence January 4, 1999 at 9:30 a.m.

(emphasis added)

[9] Jones appealed the severance decision and order. This Court dismissed the appeal.

[10] On May 18, 1999, the so-called MOU trial, to determine if the MOU was legally binding, commenced. On August 5, 1999, the trial judge found that the MOU was legally binding on the parties. In the course of his decision, the trial judge clearly recognized the scope of the matter he was dealing with on the issue that had been severed from the main trial. He stated:

> On 2 October 1998 I heard an application for an order that the legal validity of an agreement titled Memorandum of Understanding (MOU) between Mitsui & Company, Ltd (Mitsui) and Jones Power Company Ltd (JPC) be determined before the trial of these proceedings.
>
> ...

> The Memorandum of Understanding which is the subject matter of this proceeding is a relatively brief and simple document. Counsel quite properly point out that my task is limited to determining whether or not the MOU is a valid and legally binding document. The twenty days of hearings provide the factual matrix for this undertaking.

[11] It is clear from a reading of the MOU decision, that the trial judge did not wander from this task. There is nothing in that decision to indicate that he had determined that the MOU settled all pre-July 28th, 1992 disputes between the parties. Jones appealed that decision.

[12] On January 12th, 2000, while the Jones appeal of the MOU decision was pending, a case management conference was convened for the purpose of formulating plans for the proceedings both in the event that Jones' appeal was allowed and in the event it was dismissed.

[13] On February 15th, 2000, counsel for Mitsui set out its position with respect to the future proceedings in a letter to Jones' counsel. Relevant parts of that letter state:

> **Re: Point Aconi Litigation**
>
> Further to the discussion at the Case Management meeting on January 12, 2000, we are outlining herewith Mitsui's position regarding the effect of the MOU in order to facilitate identification of issues which may need to be dealt with by way of interpretation by Justice Richard prior to the litigation of the final damages phase. The consensus at the January 12, 2000 Case Management meeting was that, should the MOU appeal by Jones be dismissed, the logical next step in the litigation would be the determination by Justice Richard of the interpretation of the MOU.
>
> **SUMMARY OF MITSUI'S POSITION**
>
> The MOU is clear in its terms and legal effect. As set out in Paragraph 19 of Mitsui's October 7, 1994 Statement of Claim, Mitsui's position on the meaning of the MOU is that:
>
> 1. The MOU constituted a settlement of all outstanding disputes between Mitsui and JPC.

2. The MOU established Jones' total compensation for the Project to be $118,000,000, subject to adjustment after the date of the MOU, July 28, 1992, only in accordance with the terms of the MOU.

Accordingly, Mitsui's position is the MOU covered all of the issues raised in JPC's Statement of Claim. None of these claims are consistent with the terms of the MOU, and therefore they are not sustainable.

Mitsui's position as to the Final Contract Price is based on the MOU, and is set out in paragraph 33 of Mitsui's Amended Statement of Claim, and updated as of May 14, 1998 in Exhibit 31, Book 2 of 2, to the Deloitte & Touche Report.

Jones' claims have been advanced on the basis of the original contract and have ignored the MOU. The extent of interpretation issues will be clarified after Jones identifies which, if any, of its claims it believes can proceed in light of a valid MOU.

For the purpose of facilitating the identification of potential disputes on the meaning of the MOU which may need to be determined by Justice Richard, we address below only the main heads of claims apparent on review of the Jones' Statement of Claim.
(emphasis added by Hallett, J.A.)

...

[14] The balance of the letter dealt more specifically with Jones' respective claims which existed as of July 28th, 1992, and Mitsui's position that all such claims were settled by the MOU.

[15] On March 27th, 2000, the appeal of the MOU decision was heard by this Court; the decision was reserved.

[16] On April 20th, 2000, Jones' counsel responded to the letter of February 25th, 2000, from Mitsui's counsel. The relevant parts of that letter are as follows:

Re: Point Aconi Litigation

I write further to your letter of February 25, 2000 and the Case Management Meeting on January 12, 2000. Jones' response to your MOU valid scenario and Jones' MOU invalid scenario are included herein.

On a preliminary note, I refer to the scope of this exercise as summarized by Justice Richard during the January 12, 2000 Case Management meeting:

> And by the end of February you will have your respective positions, Mr. MacDonald, dealing with the procedure in the event

that the appeal is allowed, and Mr. Miller, in the event that the appeal is dismissed.

I also note that until we have Mr. Dawson-Edwards' report, we cannot precisely define Jones' position with respect to either scenario.

MOU Valid

Jones' position is that the MOU requires interpretation. To date, the only issue which has been decided is whether the MOU is a valid and legally binding agreement. Any comments beyond that issue in either Justice Richard's August, 1999 decision or during any Case Management meetings should not be considered binding.

A trial will be required in order for Justice Richard to have the information necessary to interpret the MOU. We anticipate adducing both *viva voce* and documentary evidence on the point and anticipate Mitsui will do the same. While it is always difficult to estimate the time which will be required for a trial, we expect Jones' evidence will take at least 2 weeks to present. ...

While not exhaustive, Jones' position is that the Contract identification/ interpretation issues post MOU include the following, all of which must be decided by Justice Richard:

1. What does the price of $118 million cover? While there is reference to drawings and specifications issued as of June 1, 1992 Jones' position is that the MOU does not meaningfully define the scope of work to be performed for that price.

2. The MOU does not define the $118 million price as a firm, fixed price and Jones' position remains that the $118 million covers the construction cost, but did not include Jones' site costs.

3. What amendments need to be made to the Contract to comply with the language of the MOU, namely that "both parties agreed to modify the contract accordingly so that those principals (sic) can be complied with". The particulars of those amendments will have to be determined by Justice Richard.

4. What is "Jones' direct cost"? And what does the 4.82% overhead number in the MOU cover?

5. What is meant by the statement that the MOU "does not change any of the ... change orders that have been agreed to prior to this date"?

As noted above, Jones' position as to the "release" effect of the MOU is quite different from Mitsui's. Again, without being exhaustive, the issues for interpretation by Justice Richard include:

1. The meaning of the statement: "Jones agrees to void all of the claim letters issued to date to Mitsui and the request for extension of time dated July 15, 1992". We note that agreeing to void a claim letter is very different from giving a general release, which is what Mitsui suggests occurred.

2. What are the claim letters? Note that we disagree with Justice Richard's suggestion that they are easy to identify and take the position that such a speculative comment was outside the narrow, severed issue which was before the Court.

3. Did the MOU operate to release any other claims of Jones? If so, which ones and to what extent? We note that the MOU does not contain any express release language and thus the scope of any release is a matter of interpretation for His Lordship.

Of course, following Justice Richard's decision in the MOU interpretation trial, a damages-related trial will be required. Depending on His Lordship's findings, this third trial may involve reviewing voluminous materials. Justice Richard has expressed his preference for employing a referee in such a situation and that may be useful. ...
(emphasis added by Hallett, J.A.)

[17] On August 23, 2000, this Court dismissed the appeal of the MOU decision. Justice Cromwell, after reviewing the history of the proceeding and the evidentiary findings of the trial judge, stated at § 86 as follows:

[86] What the law requires is reasonable certainty. Where, as here, the argument is that the agreement is so uncertain that it fails, our task is not to provide a definitive interpretation of the MOU but to determine whether it is capable of being given a reasonably certain interpretation. In my view, the terms of the MOU, read in the context of the main contract and the practice of the parties, permit the court to determine the intention of the parties with reasonable certainty. Settling that interpretation, if a dispute arises about when payments were to have been made, will be for the trial judge in the next phase of this litigation.
(emphasis added by Hallett, J.A.)

[18] He concluded in § 89 as follows:

> [89] I conclude, therefore, that the trial judge did not err in rejecting Jones' arguments that the MOU failed because it was conditional on further agreements or because it was incomplete or uncertain.

[19] Leave to appeal this decision to the Supreme Court of Canada was refused by that Court.

Relevant Facts:

[20] The facts that give rise to the application by Jones to have the trial judge recuse himself occurred after the trial judge's MOU decision and the Court of Appeal decision of August 23, 2000 but before the Supreme Court of Canada had dealt with the leave application.

[21] At a case management conference convened by the trial judge on September 27, 2000, he made reference to a statement he made in the MOU decision that it provides for an increase in the fixed contract price to $118 million Canadian and a mechanism for further adjustments to that price. He went on to state:

> ... That means, and I meant it to mean, that everything up to July 29th or 28th, 1992 has been finalized under the terms of the MOU. And I think the decision and the appeal decision upholds that position. Now we go from there.

[22] At p. 44 of the Minutes of that meeting the following exchange took place between Jones' counsel and the trial judge:

> MR. MACDONALD: Well, My lord, I really don't know at this stage what to say. I had contemplated and was under the impression all along that the next stage in this process was to have a trial. We've made submission to you. My Friends have as well, and to the Court of Appeal, to determine what the MOU means. Now, based on what you've said this morning, My Lord, I guess you've already determined what it means and, therefore, I'm sort of caught unaware, by surprise. And at this stage, I think I just have to take some instruction.
>
> THE COURT: Well, fine. I just – that is my firm feeling, is that – for instance, let's take an example. The expert's report, which is based not entirely, but substantially based upon claims for slippage in time, cost of that, cost of increased overhead due to, oh having to hire overtime - more overtime help in order to accelerate the process, in order to closely meet the completion deadline. These things, as far as I'm concerned, <u>are dead issues now</u>. They're – they've been resolved with the finding of a fixed price contract plus a definite mechanism for

increases in that. That's what it said and that's what I'm going with. That's the basis I'm proceeding on.

...

THE COURT: ... I would be less than candid if I didn't say I anticipated the discussion that we had here this morning and I gave a substantial amount of thought to what my reaction was going to be, and you have it. And we just – whatever you are prepared to go from here.

MR. MACDONALD: Well, what I would like to suggest, My Lord, is give me some time to get some instructions and perhaps we can meet again. ...
(emphasis added by Hallett, J.A.)

[23] By memorandum of that case management conference faxed to the parties on October 3rd, the trial judge stated:

4. There was considerable discussion respecting the interpretation of the MOU and the time required to complete this inquiry. Not surprisingly, there was a wide disparity in the approach of respective counsel to the so-called "MOU interpretation hearing". In order to assist the parties in their preparation for the next phase of this trial, assuming that there is a "next phase" after the mediation process has been completed, I made the following comments -

> ... the expert said (*meaning the new expert retained by Jones Power to replace Revay)* that he was told that there will be an interim hearing to determine the meaning of the MOU followed by further discovery and a trial on the issues of liability and damages. Point No. 1 - if I couldn't have determined the meaning of the MOU I would not have found it enforceable. Point No. 2 is the MOU itself - and I made this conclusion on page 29 of my decision - "the MOU provides for an increase in the contract price, fixed contract price, to a hundred and eighteen million Cdn and a mechanism for future adjustments to that price". That means, and I meant it to mean, that everything up to July 28, 1992 has been finalized under the terms of the MOU.

What remains for determination at any further interpretation hearing is the full impact of principles 1 and 2 in the MOU for the future adjustment of the contract price - after the date of signing of the MOU.

(emphasis added by Hallett, J.A.)

[24] The terms of the MOU signed on July 28th, 1992, are as follows:

Memorandum of Understanding

This Memorandum of Understanding has been initiated by Mitsui & Company, Ltd. (Mitsui) and Jones Power Company, Ltd. (Jones) for the Pt. Aconi - Unit 1 project. The purpose of the document is to eliminate current misunderstandings that exist relative to Jones' compensation (i.e., fixed price and bill of quantity components) under the existing contract. Jones compensation for the project is hereby increased to C$118 Million based on the following agreement relative to future adjustments;

- *Jones will proceed so that the plant completion date is between July 1 and 15, 1993. This does not change the original date at which liquidation damages penalties become effective. They will remain as previously identified in the existing contract.*

- *This document does not change any of the remaining provisions of the existing contract or change orders that have been agreed to prior to this date. Included in this change order are pending change orders number 11 and 12, and the pending change order covering necessary boiler instrumentation installation work.*

- *Jones agrees to void all of the claim letters issued to date to Mitsui and the request for extension of time dated July 15, 1992.*

- *Future adjustments to compensation are not excluded by this agreement. Change orders can only be caused by the principals listed below or by mutual agreement:*

<u>Principal (Sic) 1</u>

Nova Scotia Power Corporation (NSPC) may agree to pay for additional or decreased work to be performed by Jones. All parties agree that this work will not be performed until a change order is initiated by NSPC in the amount required. Upon agreement, Mitsui will issue a corresponding change order to Jones.

Mitsui can request that work be performed at their own cost. This would result in a change order from Mitsui to Jones.

<u>Principal 2</u>

The work identified by the existing contract is based on the design documents which have been generated and issued by the engineer on or before June 1, 1992 and/or those currently being discussed with Jones. Design documents which produce a change to this design basis will be treated as a change order. Work will not be started on these changes until a change order has been issued by Mitsui to Jones. Jones is obligated to advise Mitsui of changes that are covered by this principal before the changes become critical to the schedule.

Principal 3

If from time to time work is required because a manufacturer has supplied equipment that is not in conformance with the design requirements, any rework or warrantee work associated with this type of change will be performed by Jones and compensated for by Mitsui. However, compensation of this work depends on Jones providing adequate documentation (i.e., pictures or sketches of fault conditions, signed time tickets, etc.) that the work is required and that the cost of re-work or warrantee work is reasonable. Jones understands that Mitsui will seek reimbursement from the original manufacturer.

Relative to this Principal 3, any re-work required due to faulty performance by Jones' sub-contractor in installing the original work is excluded. Jones agrees that this work is at their cost.

The above outlined principals will be used to modify and determine the final compensation for work performed on the Pt. Aconi - Unit 1 project. Change orders developed hence forth will include a value for overhead. This value will be calculated at 4.82% of the Jones' direct cost. Both parties agreed to modify the contract accordingly so that these principals can be complied with.

No time has been set for the completion of the necessary contract review and preparation of the change order to accomplish this memorandum of understanding. However, both parties agreed to do their best to develop a suitable change order in a timely fashion.

As agreed to on this day of July 28, 1992 by:

Koichi Nitta,	*D.L. Walcott,*
General Manager, Plant Team	*President,*
Mitsui & Co., Ltd.	*Jones Power Company, Ltd.*

The Recusal Decision:

[25] A request by Jones to have the trial judge recuse himself followed the receipt of the trial judge's memorandum of October 3rd. The trial judge declined the request. Jones then made a formal application. The application was heard by the trial judge. He concluded that he ought not to recuse himself. In the course of his recusal decision he stated at § 11:

> [11] Keeping in mind this contextual matrix, the statement in the MOU - *"The purpose of the document is to eliminate current misunderstandings that exist relative to Jones's compensation (i.e., fixed price and bill of quantity components) under the existing contract"* is simple and direct. This statement appears in the opening paragraph of the MOU and is followed by an upward adjustment of the fixed price. In my view the only reasonable interpretation of this clause is that everything leading up to the execution of the MOU including the previous negotiations, the many claims set out and argued in the position papers, and all other disputes and misunderstandings were settled by and subsumed into the MOU. The MOU was signed by Nitta and Walcott in the afternoon of 28 July after each had reviewed the document and suggested several changes. In decision #5, the Court of Appeal said (para 26) "*The trial judge found as a fact that both Nitta and Walcott were firmly of the opinion that, with the signing of the MOU, they had resolved the outstanding disputes between their companies relating to the Point Aconi project.*" Cromwell, J.A. speaking for the Court said (para 59) *"I would not disturb any of the trial judge's factual findings which have been challenged by Jones on appeal."*

[26] I have underlined the statement the trial judge made that, in his view, the only reasonable interpretation of the clause in question was that everything leading up to the execution of the MOU, including the previous negotiations, the many claims set out and argued in the position papers, and all other disputes and misunderstandings was settled by and subsumed by the increase in price to $118 million as provided for in the MOU. He clearly indicates that he had interpreted what the MOU meant insofar as it related to disputes that had arisen prior to July 28th, 1992.

[27] A further statement indicating that he had reached a partial interpretation of the MOU is contained in § 30 of the recusal decision. He stated:

> [30] I have determined the intention of the parties to be that matters pre-dating the MOU have been largely settled by the MOU and that what remains is to review and interpret those clauses and principles set out in the balance of the document. This is consistent with my findings at trial as confirmed on appeal. This is the only reasonable and realistic interpretation of the MOU and the substance of my decision. That is basically what I said at the Case Management Conference of 27 September 2000.
> (emphasis added by Hallett, J.A.)

[28] After referring to the law on bias, the trial judge stated:

> [54] The reasonable person with a complex and contextualized understanding of the evidence and the issues would realize that throughout these proceedings Mitsui and Jones have maintained dramatically divergent views as to the meaning of the MOU. Mitsui has consistently taken the position that the MOU settled the disputes which pre-dated the MOU, with the exception of the several matters alluded to specifically in the MOU. Jones had maintained the position that the MOU was not a legally binding document but merely the basis for further negotiation or an "agreement to agree" and therefore unenforceable. After the MOU had been found at trial to be a legal and binding agreement Jones maintained the position that the entire document was subject to further interpretation and that its meaning must still be determined. It has been my view, since the MOU hearing, that the pre MOU disputes had been resolved and subsumed into the MOU. It seems that my view is more consistent with that of Mitsui rather than with the position taken by Jones. That, of itself, does not give rise to an apprehension of bias. If such was the case then any ruling or finding of a trial judge could be grounds for a claim of judicial bias. It is one thing to find that a particular ruling or decision is prejudicial to one or another of the parties - but quite another thing to say that such a ruling or decision raised the spectre of bias! In R. v. C.(R.C.), 2000 Carswell Ont 139 the court said "*it is clearly not the law that a court demonstrates bias or partiality merely because it questions or even rejects a position taken by one or both of the parties*." This is a fair statement of the law.

[29] Paragraph 58 of his decision on the recusal motion concluded with the following comment relative to Jones' submission that he should recuse himself:

> [58] ... In light of the preceding analysis of the law as applied to the facts of this case I am inclined to the opposite view. To accede to Jones' application and withdraw from this litigation would militate against the concept of judicial independence and undermine the administration of justice. A judge must be free to render a ruling, a decision or a finding based upon his or her reasonable and reasoned view of the evidence and the law. In this context, and after due deliberation, I have rejected the position taken by Jones respecting the legal impact and interpretation of the MOU. That, of itself, cannot be reasonably construed as denoting a real likelihood or probability of bias.

The Law of Bias and the Appearance of Bias:

[30] In **R. v. S.(R.D.)**, [1997] 3 S.C.R. 484, Cory, J. wrote authoritatively under the heading "Ascertaining the existence of a reasonable apprehension of bias". In **S.(R.D.)**, the sole issue before the Supreme Court of Canada was whether a trial judge's reasons for her decision demonstrated actual or perceived bias. At p. 523 Cory, J. stated:

[91] A system of justice, if it is to have the respect and confidence of its society, must ensure that trials are fair and that they appear to be fair to the informed and reasonable observer. This is a fundamental goal of the justice system in any free and democratic society.

...

[94] Trial judges in Canada exercise wide powers. They enjoy judicial independence, security of tenure and financial security. Most importantly, they enjoy the respect of the vast majority of Canadians. That respect has been earned by their ability to conduct trials fairly and impartially. These qualities are of fundamental importance to our society and to members of the judiciary. Fairness and impartiality must be both subjectively present and objectively demonstrated to the informed and reasonable observer. If the words or actions of the presiding judge give rise to a reasonable apprehension of bias to the informed and reasonable observer, this will render the trial unfair.

[31] He stated further at § 99:

[99] If actual or apprehended bias arises from a judge's words or conduct, then the judge has exceeded his or her jurisdiction. See *Curragh*, *supra*, at para. 5; *Gushman*, *supra*, at para. 28. This excess of jurisdiction can be remedied by an application to the presiding judge for disqualification if the proceedings are still underway, or by appellate review of the judge's decision. In the context of appellate review, it has recently been held that a "properly drawn conclusion that there is a reasonable apprehension of bias will ordinarily lead inexorably to the decision that a new trial must be held": *Curragh*, *supra*, at para. 5.

[32] Justice Cory posed the question: What is bias? and he answered it as follows:

[103] It may be helpful to begin by articulating what is meant by impartiality. In deciding whether bias arises in a particular case, it is relatively rare for courts to explore the definition of bias. In this appeal, however, this task is essential, if the Crown's allegation against Judge Sparks is to be properly understood and addressed. See Prof. Richard F. Devlin, "We Can't Go On Together with Suspicious Minds: Judicial Bias and Racialized Perspective in R. v. R.D.S." (1995), 18 *Dalhousie L.J.* 408, at pp. 438-39.

[104] In *Valente v. The Queen*, [1985] 2 S.C.R. 673, at p. 685, Le Dain J. held that the concept of impartiality describes "a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case". He added that "[t]he word `impartial' . . . connotes absence of bias, actual or perceived". See also *R. v. Généreux*, [1992] 1 S.C.R. 259, at p. 283. In a more positive sense, impartiality can be described -- perhaps somewhat inexactly -- as a state of mind in which the adjudicator is disinterested in the outcome, and is open to persuasion by the evidence and submissions.

> [105] In contrast, bias denotes a state of mind that is in some way predisposed to a particular result, or that is closed with regard to particular issues. ...
>
> [106] A similar statement of these principles is found in *R. v. Bertram*, [1989] O.J. No. 2123 (H.C.), in which Watt J. noted at pp. 51-52:
>
> > In common usage bias describes a leaning, inclination, bent or predisposition towards one side or another or a particular result. In its application to legal proceedings, it represents a predisposition to decide an issue or cause in a certain way which does not leave the judicial mind perfectly open to conviction. Bias is a condition or state of mind which sways judgment and renders a judicial officer unable to exercise his or her functions impartially in a particular case.

[33] I find Justice Watts' statement in **R. v. Bertram**, particularly relevant to the issue before us.

[34] Justice Cory then went on to deal with the test for finding a reasonable apprehension of bias. He stated at § 109:

> [109] When it is alleged that a decision-maker is not impartial, the test that must be applied is whether the particular conduct gives rise to a reasonable apprehension of bias. *Idziak*, *supra*, at p. 660. It has long been held that actual bias need not be established. This is so because it is usually impossible to determine whether the decision-maker approached the matter with a truly biased state of mind. See *Newfoundland Telephone*, *supra*, at p. 636.

[35] He then dealt with the manner in which the test should be applied. He stated, commencing at § 111:

> [111] The manner in which the test for bias should be applied was set out with great clarity by de Grandpré J. in his dissenting reasons in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, at p. 394:
>
> > [T]he apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. . . . [The] test is "what would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- conclude. . . ."
>
> This test has been adopted and applied for the past two decades. It contains a two-fold objective element: the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case. See *Bertram*, *supra*, at pp. 54-55; *Gushman*, *supra*, at

para. 31. Further the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including "the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold": *R. v. Elrick*, [1983] O.J. No. 515 (H.C.), at para. 14. See also *Stark*, *supra*, at para. 74; *R. v. Lin*, [1995] B.C.J. No. 982 (S.C.), at para. 34. To that I would add that the reasonable person should also be taken to be aware of the social reality that forms the background to a particular case, such as societal awareness and acknowledgement of the prevalence of racism or gender bias in a particular community.

[112] The appellant submitted that the test requires a demonstration of "real likelihood" of bias, in the sense that bias is probable, rather than a "mere suspicion". This submission appears to be unnecessary in light of the sound observations of de Grandpré J. in *Committee for Justice and Liberty*, *supra*, at pp. 394-95:

> I can see no real difference between the expressions found in the decided cases, be they `reasonable apprehension of bias', `reasonable suspicion of bias', or `real likelihood of bias'. The grounds for this apprehension must, however, be substantial and I entirely agree with the Federal Court of Appeal which refused to accept the suggestion that the test be related to the "very sensitive or scrupulous conscience". [Emphasis added.]

Nonetheless the English and Canadian case law does properly support the appellant's contention that a real likelihood or probability of bias must be demonstrated, and that a mere suspicion is not enough. See *R. v. Camborne Justices, Ex parte Pearce*, [1954] 2 All E.R. 850 (Q.B.D.); *Metropolitan Properties Co. v. Lannon*, [1969] 1 Q.B. 577 (C.A.); *R. v. Gough*, [1993] 2 W.L.R. 883 (H.L.); *Bertram*, *supra*, at p. 53; *Stark*, *supra*, at para. 74; *Gushman*, *supra*, at para. 30.

[113] Regardless of the precise words used to describe the test, the object of the different formulations is to emphasize that the threshold for a finding of real or perceived bias is high. It is a finding that must be carefully considered since it calls into question an element of judicial integrity. Indeed an allegation of reasonable apprehension of bias calls into question not simply the personal integrity of the judge, but the integrity of the entire administration of justice. See *Stark*, *supra*, at paras. 19-20. Where reasonable grounds to make such an allegation arise, counsel must be free to fearlessly raise such allegations. Yet, this is a serious step that should not be undertaken lightly.

> [114] The onus of demonstrating bias lies with the person who is alleging its existence: *Bertram*, *supra*, at p. 28; *Lin*, *supra*, at para. 30. Further, whether a reasonable apprehension of bias arises will depend entirely on the facts of the case.

[36] Justice Cory concluded his review of the law on the appearance of bias with comments on judicial integrity and the importance of judicial impartiality. He stated at p. 533:

> [117] Courts have rightly recognized that there is a presumption that judges will carry out their oath of office. See *R. v. Smith & Whiteway Fisheries Ltd.* (1994), 133 N.S.R. (2d) 50 (C.A.), and *Lin*, *supra*. This is one of the reasons why the threshold for a successful allegation of perceived judicial bias is high. However, despite this high threshold, the presumption can be displaced with "cogent evidence" that demonstrates that something the judge has done gives rise to a reasonable apprehension of bias. See *Smith & Whiteway*, *supra*, at para. 64; *Lin*, *supra*, at para. 37. The presumption of judicial integrity can never relieve a judge from the sworn duty to be impartial.
>
> [118] It is right and proper that judges be held to the highest standards of impartiality since they will have to determine the most fundamentally important rights of the parties appearing before them. This is true whether the legal dispute arises between citizen and citizen or between the citizen and the state. Every comment that a judge makes from the bench is weighed and evaluated by the community as well as the parties. Judges must be conscious of this constant weighing and make every effort to achieve neutrality and fairness in carrying out their duties. This must be a cardinal rule of judicial conduct.

[37] It is apparent from a review of the four opinions written by the judges of the Supreme Court of Canada in **R. v. S. (R.D.)** that the lead judgment on the nature of bias and the test to be applied in making a determination respecting the appearance of bias is that of Cory, J. He wrote for himself and Iacobucci, J.

[38] Major, J., writing for himself, Lamer, C.J. and Sopinka, J. in dissent, stated at § 23:

> [23] I agree with the approach taken by Cory J. with respect to the nature of bias and the test to be used to determine if the words or actions of a judge give rise to apprehension of bias. However, I come to a different conclusion in the application of the test to the words of the trial judge in this case. It follows that I disagree with the approach to reasonable apprehension of bias put forward by Justices L'Heureux-Dubé and McLachlin

[39] In short, four other members of the Court agreed with Cory, J.'s comments as to the nature of bias and the test he enunciated. It is for that reason that I have quoted extensively from the reasons of Cory, J. rather than those of

McLachlin and L'Heureux-Dubé, JJ. Justice Cory's decision represents the views of the majority of the Court.

[40] In **J.B.B. and C.B.B. v. J.A.B. et al.** (1992), 113 N.S.R. (2d) 60 (C.A.), Chief Justice Clarke dealt with the issue of perception of bias. The head note summarizes the facts as follows:

> There was a custody battle between the natural mother and her companion, the natural father and the persons with whom the children had been left. Before crucial evidence was heard, the Family Court judge, in Chambers, advised counsel that in his opinion custody should go to the mother and continuation of the trial was a waste of time. Counsel for the persons with de facto care for the children requested that the judge disqualify himself on the ground of bias. The judge refused and awarded custody to the mother. The persons with care of the children appealed.

[41] The appellants contended that the actions of the trial judge created an appearance of bias. They alleged that the trial judge appeared to have decided the case before he heard all of the evidence. To the appellants the trial judge's comments gave the appearance of a closed mind. Chief Justice Clarke agreed with these submissions.

[42] After referring to the test enunciated by de Grandpré, J. in **Committee for Justice and Liberty Foundation et al. v. National Energy Board** (1976), 9 N.R. 115; 68 D.L.R. (3d) 716 Chief Justice Clarke concluded as follows:

> [20] The test is objective: what a reasonable person would think in the circumstances. Here it would be that the judge had made his decision before all the evidence from all the parties was heard. Conversations between the presiding judge and counsel in the judge's chambers during the course of a trial relating to the issues at trial are neither protected by immunity nor exempt from the proper application of law.

[43] In short, he decided that there was an appearance of bias as the judge appeared to have made his decision before all of the evidence from all the parties had been heard.

<u>Disposition of the Appeal</u>

[44] Mitsui submitted that a reasonable and right-minded person with a full understanding of all the relevant facts would not apprehend that the trial judge had lost his ability to judge impartially. With respect, I am unable to agree.

[45] I will commence by dealing with the detailed arguments made by Mitsui.

[46] In addition to asserting that the trial judge correctly applied the **R. v. S.(R.D.)** test in determining that his statements did not create an appearance of bias, Mitsui stated in § 140 of its factum that:

> [140] The reasonable and right-minded person having a complex and contextualized understanding of these matters would not apprehend that an experienced trial judge in the position of Richard, J. has lost his ability to judge impartially and without favour for the position of either side in these complex proceedings. The reasonable observer would not apprehend bias as a result of His Lordship's comments at the September 27, 2000 Case Management Conference in light of the entire context of this matter, including:
>
> - the Appellants' repudiation of the MOU on July 29, 1992,
>
> - the Respondent's position from the outset that the MOU constituted a settlement of disputes,
>
> - the positions taken by the parties during these very complex proceedings over the course of approximately six years of litigation to September, 2000,
>
> - the Appellant's opposition to the severance, and the rejection by the Courts of that position,
>
> - the nature of the evidence given at the MOU trial,
>
> - the text of the MOU, and the findings of fact and credibility at trial and on appeal in connection with the MOU issue, including undisturbed findings that the fundamental purpose and intent of the MOU was to resolve the outstanding differences of the parties,
>
> - the role of judges to encourage settlements where possible, and the role of Richard, J. in particular, subsequent to the MOU Trial Decision, urging the parties to proceed to mediation in this case,
>
> - the fair manner in which Richard, J. conducted these proceedings,
>
> - the ability and duty of judges to impartially assess legal arguments, and to decide between the positions of adversarial parties,
>
> - the absence of any agreed scope of "interpretation issues" or orders or directions of the Court in that respect prior to September 27, 2000,

- the absence of any cogent articulation of issues by the Appellants relating to the period prior to July 28, 1992 which required "interpretation" as alleged.

[47] The fact that Jones repudiated the MOU on July 29, 1992, is not relevant to the question as to whether Jones can get a fair trial in light of the trial judge's comments. The fact that Mitsui, from the outset, took the position that the MOU constituted a settlement of disputes and, in particular, those which had arisen before July 28, 1992, is not relevant to the issue of whether the trial judge, in view of his comments, can proceed to interpret the MOU fairly.

[48] Nor is it relevant that the parties took divergent views over the course of six years of litigation.

[49] Nor is it relevant that Jones unsuccessfully opposed the severance.

[50] The nature of the evidence given at the MOU trial has relevancy and the MOU itself is of paramount relevancy with respect to the ultimate interpretation of the MOU. However, on the issue before us, whether or not Jones can get a fair trial on the issues yet to be decided, those factors are totally irrelevant. The only issue on appeal is to determine the effect of the comments the trial judge has made that indicate that he has interpreted the MOU as settling all pre-July 28, 1992 disputes. That was not an issue at the MOU trial.

[51] Even accepting that the fundamental purpose and intent of the MOU was to resolve outstanding differences, the MOU has to be interpreted to determine whether and to what extent the MOU, as written, gave effect to this intent. Other than for the purpose of ascertaining if the MOU was legally binding or not, the evidence Mitsui refers to was not otherwise relevant at the MOU trial.

[52] The issue before us is not whether the trial judge generally conducted the proceedings in a fair manner but whether in this instance he has created an appearance of bias by his comments.

[53] Clearly we must consider that judges are presumed to be impartial and have every right and, in fact, a duty to decide between the positions of adversary parties before the judge. However, a trial judge cannot pre-judge issues that are not before him or on which the evidence has not been completed or submissions made. In this proceeding, the interpretation of the MOU was for the next stage of the proceeding.

[54] There did not have to be an agreed scope of interpretation issues as Mitsui asserts. The interpretation of the MOU was open ended as that part of the trial had not been held prior to the trial judge's comments. Finally, Jones did not have to articulate what pre-July 28, 1992 issues required interpretation. The entire MOU required interpretation as the only issue resolved at the severed trial was whether the document was legally binding. That is the issue the trial judge determined at the MOU trial and this decision was affirmed on appeal.

[55] In § 107 of its factum, Mitsui makes the additional point:

> [107] In the MOU trial and appeal, the Appellant raised numerous issues relating to the intention of the parties, and concerning the wording of the MOU. Paragraph 3 of the Order granting severance dated October 9, 1998 provided that the evidence at the MOU trial be confined to that relevant to a number of paragraphs in the Mitsui Statement of Claim, including paragraph 19 which pleaded, *inter alia*, that:
>
> - the purpose of the July 28, 1992 meeting was to negotiate a final and binding settlement of the outstanding disputes between the Defendant JPC and the Plaintiff, and, in particular, the basis of compensation of the Defendant JPC for the completion of the Point Aconi project.
>
> - following further negotiations, the Defendant JPC and the Plaintiff agreed to the terms of settlement of all outstanding issues and executed a written agreement of the settlement
>
> - the MOU provided, *inter alia*, that the total compensation for the Defendant JPC on the Point Aconi project was $118,000,000, subject to adjustment after the date of the MOU, July 28, 1992, only in accordance with the terms of the MOU.

[56] These assertions in the statement of claim do no more than show that Mitsui's position is that the MOU was intended to settle outstanding disputes. The fact that the trial judge, in his MOU decision, rejected Jones' position that the MOU was not legally binding does not assist one in answering the question as to whether or not Jones can receive a fair trial on the issues yet to be tried. Those issues include the interpretation of the MOU beyond merely the determination that it is legally binding on the parties.

[57] In summary, the submissions made by Mitsui do not deal with the obvious fact that the trial of the severed issue was to determine only if the MOU was

legally binding as stated in the Severance Order. That is all the trial judge did in his decision. He said nothing in the MOU decision that by agreeing to the increase in price to $118 million, the parties had settled all disputes that existed prior to July 28, 1992. The interpretation of the MOU was for the next stage of the trial. Evidence to assist in ascertaining the meaning of the MOU would be adduced at that time by Jones.

[58] The decision of Justice Cromwell on the appeal to this Court by Jones from the trial judge's decision on the MOU trial, dismissed the appeal, finding that the trial judge did not err in holding that the MOU was legally binding. The relevant comments of Justice Cromwell are as follows:

> [60] There are two legal issues to be resolved on appeal: first, whether the trial judge erred in finding that the MOU was a valid and legally binding contract and second, whether the trial judge erred in finding that MPA was a party to the MOU. I turn first to the question of whether the MOU was a legally binding contract.
>
> ...
>
> [61] The trial judge found that Nitta (for Mitsui) and Walcott (for Jones) intended, by signing the MOU, to enter into a legal contract and that they were firmly of the opinion the signing of the MOU resolved all outstanding disputes in relation to the project. I have concluded that these findings should not be disturbed on appeal.
>
> ...
>
> [65] Therefore, with respect to all of Jones' arguments concerning certainty and completeness, the fact that the parties to the MOU intended it to be a binding contract is highly relevant. All of the submissions by Jones relating to completeness and certainty must, therefore, be considered in light of the fundamental factual finding that the parties intended to conclude a binding agreement and, with the signing of the MOU, thought that they had done so.
>
> ...
>
> [73] For these reasons, I reject Jones' argument that the trial judge erred in either law or fact in concluding that the legal effectiveness of the MOU is not conditional on the contract review or the signing of a change order.

[59] As indicated in § 17 of my decision, Justice Cromwell, at § 86 of his decision, stated that the Appeal Court's task was not to provide a definitive

interpretation of the MOU. He concluded at § 89 that the trial judge did not err in rejecting Jones' argument that the MOU failed because it was conditional on further agreements or because it was incomplete or uncertain.

[60] I repeat what the trial judge stated at § 30 of his recusal decision:

> [30] I have determined the intention of the parties to be that matters pre-dating the MOU have been largely settled by the MOU and that what remains is to review and interpret those clauses and principles set out in the balance of the document. This is consistent with my findings at trial as confirmed on appeal. This is the only reasonable and realistic interpretation of the MOU and the substance of my decision. That is basically what I said at the Case Management Conference of 27 September 2000.

[61] This statement is a clear indication that the trial judge went beyond deciding the issue that he had before him on the MOU trial. The severance order could not have been more specific. It states in § 1 that the issue of whether or not the MOU constituted a valid and legally binding agreement was to be tried before the trial in these proceedings.

[62] The fact that this Court did not interfere with the trial judge's finding that Nitta (for Mitsui) and Walcott (for Jones) intended to enter into a legal contract and the finding that they were firmly of the opinion that the signing of the MOU settled all outstanding disputes, does not justify the trial judge's subsequent comment that the MOU settled all pre-July 28, 1992 disputes by the increase in the contract price to $118 million. The fact that Nitta and Walcott were of the opinion that the MOU settled all disputes that existed prior to July 28th, 1992, does not resolve the question as to what the MOU means. The interpretation of the MOU was for the trial of the proceedings.

[63] The comments of the trial judge at the case management conference on September 27, 2000, confirmed in his memo of that conference and reiterated in his recusal decision (collectively "the comments") gives the appearance of a closed mind with respect to the interpretation of the MOU relative to disputes between the parties that existed before July 28, 1992. He has indicated by his comments that such disputes have been settled and subsumed by provisions in the MOU for an increased contract price. In short, the trial judge has interpreted the MOU, an issue central to the dispute between the parties. He has done so without hearing all evidence that might be relevant and admissible on that issue and without hearing submissions on that issue.

[64] The interpretation of the MOU was for the next step in the proceedings. That Jones intended to adduce evidence and make submissions respecting

the interpretation of the MOU relevant to pre-July 28, 1992, disputes is evident from the contents of the letter written by its counsel to Mitsui's counsel on April 20, 2000 and set out in §16 above. That letter was written prior to this Court filing its decision on August 23, 2000, dismissing the appeal from the trial judge's MOU decision.

[65] The comments of the trial judge indicate that he had decided by September 27, 2000, that the MOU had finalized all pre-July 28, 1992 disputes by reason of the increase in the contract price to $118 million. He described certain claims that pre-dated the signing of the MOU and referred to in an expert's report as "dead issues". He reached his conclusion without hearing the evidence or the submissions Jones intended to make as to the meaning of the MOU relevant to pre-July 28, 1992 disputes. For example, he did so without hearing evidence or submissions as to what the $118 million price covered; what are the "claims' letters" voided by the MOU; and whether the MOU released "other claims" of Jones. The trial judge's comments give the impression that he has pre-judged live issues as the only issue before the trial judge on the MOU trial was limited to determining if the MOU was legally binding.

[66] The fact that Nitta and Walcott thought they had settled everything when they signed the MOU does not obviate the need to interpret the MOU to determine, based on all the evidence to be adduced on that issue, exactly what the MOU had settled according to its terms.

[67] The words of Watt, J. in **R. v. Bertrum** are relevant. I repeat them:

> In common usage bias describes a leaning, inclination, bent or predisposition towards one side or another or a particular result. In its application to legal proceedings, it represents a predisposition to decide an issue or cause in a certain way which does not leave the judicial mind perfectly open to conviction. Bias is a condition or state of mind which sways judgment and renders a judicial officer unable to exercise his or her functions impartially in a particular case.

[68] Applying the two-fold test for the apprehension of bias set out by Cory, J. in **R. v. S.(R.D.)** and having reviewed the record of the proceedings and the comments of the trial judge, I am satisfied that a reasonable person with knowledge of all the relevant facts and aware of the traditions of integrity and impartiality that superior court judges possess would come to the conclusion that the trial judge has an appearance of bias. Such a conclusion would, in my opinion, be a reasonable conclusion on the facts and circumstances of this case. Let me emphasize that I do not in any way question the trial judge's integrity.

[69] In summary, right-minded persons possessed of all the relevant information would reasonably conclude that the trial judge's comments create an appearance of bias as to

how he would interpret the MOU relative to pre-July 28, 1992, disputes. He appears to have made up his mind on a serious issue (**R. v. Valente**, [1985] 2 S.C.R. 673). While unfortunate, the trial judge's comments were clearly inappropriate in the circumstances.

[70] It would not be reasonable to expect, despite the trial judge's integrity, that a fully informed reasonable person would perceive that the trial judge could impartially adjudicate an issue that he has already decided.

[71] It is unfortunate that the trial judge made the comments he did as this litigation is complex and has now gone on for some seven years. The comments were likely made out of frustration with the progress of the litigation and in the hope of speeding the proceedings along. The trial judge had heard a great deal of evidence that would be relevant to interpreting the MOU. However, he had not heard all of the evidence on that issue. Nor was the issue before him.

[72] The facts are not unlike those that led Chief Justice Clarke to conclude that there was an appearance of bias in **J.J.B.** where the trial judge reached a conclusion before hearing all of the evidence and submissions of all of the parties.

[73] I am satisfied that leave to appeal should be granted and the appeal should be allowed. An order should be made recusing the trial judge from any further involvement in the management, hearing or resolution of the dispute between the parties. Jones has requested that we make an order expunging from the record all comments made by the trial judge during the case management conference and in the memorandum of that conference, as faxed to the parties on October 3rd, 2000, that, in effect, constituted a partial interpretation of the MOU. There is no point in doing so as with the filing of this decision those comments are part of the record.

[74] Jones shall have costs in the amount of $4,000 plus disbursements.

Hallett, J.A.

Concurred in:

Glube, C.J.N.S.

Freeman, J.A.