

<u>CASE NO.</u>	<u>VOL. NO.</u>	<u>PAGE</u>
JONES POWER COMPANY LTD., a body corporate, and J.A. JONES CONSTRUCTION COMPANY, a body corporate <div style="text-align: right;">Appellants</div>	- and -	MITSUI & CO. (POINT ACONI) LTD., a body corporate <div style="text-align: left;">Respondent</div>
CA 156440	Halifax	ROSCOE, J.A.

[Cite as: Mitsui & Co. (Point Aconi) Ltd. v. Jones Power Co. Ltd., 2000 NSCA 96]

APPEAL HEARD: March 27, 2000

JUDGMENT DELIVERED: August 23, 2000

SUBJECT: Evidence, Production of Documents, Solicitor Client Privilege, Litigation Privilege

SUMMARY: A few weeks before the trial was scheduled to commence, the appellants made an application to the trial judge for production of 91 documents which the respondent claimed were privileged. The trial judge ordered the production of a few of the documents. The notice of appeal of that decision was filed on the 13th day of the trial but no application for an adjournment or a stay was made. The trial, which concerned the legal effect of a Memorandum of Understanding (MOU) between the parties, continued for a total of 20 days. The documents appeal was heard at the same time as the appeal from the decision respecting the validity of the MOU.

ISSUES:

1. When was litigation contemplated by Mitsui?
2. Are draft copies of documents privileged if the final version of it is produced?
3. Does sending a carbon copy of an otherwise non-privileged document to counsel change its characterization?
4. Are documents reflecting pre-trial strategy privileged?
5. When is privileged waived?
6. Did the trial judge err in not ordering production of the 91 documents?

7. If so, should there be a new trial of the MOU issues?

RESULT:

1. There was sufficient evidence for the trial judge to have found that litigation was reasonably contemplated at least by August 6, 1992.

2. Draft documents which reveal either that legal advice was sought and received, or were a necessary step in the process of receiving legal advice are subject to solicitor client privilege .

3. Documents are not privileged simply because a copy was sent to a lawyer.

4. Although documents prepared for the dominant purpose of the litigation are privileged, as are those containing confidential legal advice, there is no general protection for documents containing pre-trial strategy.

5. Privilege was not waived in this case when documents were disclosed to Sergent & Lundy, a party with a common interest with the respondent.

6. Appeal allowed. The trial judge erred in the application of the principles of solicitor client privilege and litigation privilege to the documents in issue. Production of 12 entire documents and parts of 24 other documents ordered.

7. No new trial ordered.

THIS INFORMATION SHEET DOES NOT FORM PART OF THE COURT'S JUDGMENT. QUOTES MUST BE FROM THE JUDGMENT, NOT FROM THIS COVER SHEET. THE FULL COURT JUDGMENT CONSISTS OF 50 PAGES.