

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT
JENNINGS, PITT and KITELEY JJ.

B E T W E E N:)
)
JASMINE RAGOONANAN and PHILIP) *Andrew J. Roman*
RAGOONANAN by their estate representative) for the Plaintiffs (Appellants)
DAVINA RAGOONANAN and RANUKA)
BABOOLAL by her estate representative) *Joel Rochon and Sakie Tambakos*
VASHTI BABOOLAL) for the Plaintiffs (Appellants)
)
Plaintiffs)
(Appellants))
- and -)
)
IMPERIAL TOBACCO CANADA LIMITED) *Deborah Glendining,*
) *Andrea Laing and Timothy Morgan*
Defendant) for the Defendant (Respondent)
(Respondent))
- and -)
)
DAVINA RAGOONANAN and RONALD)
BALKARRAN)
Third Parties) **HEARD:** January 28, 29, and 31, 2008

JENNINGS J. :

[1] Davina Ragoonanan, Estate Representative for Jasmine and Philip Ragoonanan, and Vashti Baboolal, Estate Representative for Ranuka Baboolal (“the appellants”) appeal from the decision of Cullity J. dated October 31, 2005, dismissing the appellants’ motion for certification of a class action against Imperial Tobacco Canada Limited (“ITCL” or “the respondent”).

[2] The respondents bring a cross-appeal seeking leave to appeal the cost endorsement of Cullity J. pronounced March 10, 2006, and, if leave be granted, to appeal from the decision contained in that endorsement.

BACKGROUND

[3] The appellants are the personal representatives of Jasmine and Philip Ragoonanan and Ranuka Baboolal.

[4] The respondent is a manufacturer and distributor of tobacco products including cigarettes.

[5] On January 18, 1998, a fire started in the townhouse of Davina Ragoonanan in Brampton. In the fire, the lives of Jasmine Ragoonanan, (Davina's daughter), Philip Ragoonanan, (Davina's brother) and Ranuka Baboolal, (Philip's former girlfriend), were lost.

[6] The appellants claim that the fire started when a cigarette manufactured by the respondent and being smoked by Philip ignited a sofa in the second floor living room of the townhouse. The bodies of Jasmine, Ranuka and Philip were discovered on the third floor of the townhouse. The appellants plead that Philip was sitting on the sofa smoking and watching television when he was last seen about midnight. The fire started in the early hours of the morning.

[7] The appellants submit that the cigarettes sold in Canada by the respondent are defective because they pose an unreasonable risk of igniting residential fires, when compared with existing alternative cigarette designs. They submit that by October 1, 1987, the design of cigarettes with greatly reduced propensity for igniting upholstered furniture and mattress fires, which are referred to as fire safe cigarettes, was well known. They submit that the respondent had a duty to cease

production of conventional cigarettes and to design, manufacture and sell fire safe cigarettes and that in failing to do so the respondent, they claim, is thereby liable for the reasonably foreseeable harm caused by its defectively designed cigarette. The appellants claim for damages for the negligent manufacture and design of the cigarette and for punitive damages.

[8] In June 2005 Health Canada passed the *Cigarette Ignition Propensity Regulations*¹ requiring all cigarettes manufactured in or imported into Canada to meet a reduced ignition propensity standard as of October 1, 2005.

[9] The statement of claim in this action was issued on January 11, 2000. On December 5, 2000 Cumming J. dismissed a motion² brought by the defendant pursuant to rule 21 in which the defendant sought to have the statement of claim struck out as against it for disclosing no reasonable cause of action. Cumming J. found that the risk-utility theory of liability for defective design was a plausible legal theory in support of the asserted cause of action.

[10] Over 5 days in February 2005, Cullity J. heard a motion brought by the defendant for summary judgment. He dismissed the motion finding that triable issues existed on the 5 questions of causation raised by counsel for the appellants. Cullity J. found³ that the case was “close to the line” and that the evidence connecting the plaintiff’s smoking to the fire was weak.

¹ S.O.R./2005-178 under the *Tobacco Act* (1997), c.13

² (2000) 51 O.R. (3d) 603

³ [2005] O.J. No. 867

[11] On September 13, 14 and 15, 2005, Cullity J. heard the appellants' application for certification under the *Class Proceedings Act, 1992*⁴. Cullity J. released extensive reasons on October 31, 2005 dismissing⁵ the application for certification.

THE REASONS OF THE MOTIONS JUDGE

[12] At the certification hearing, Cullity J. considered whether the requirements for certifying a class action under s.5(1) of the CPA were satisfied. That provision states:

- 5(1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,
- (a) the pleadings or the notice of application discloses a cause of action;
 - (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
 - (c) the claims or defences of the class members raise common issues;
 - (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
 - (e) there is a representative plaintiff or defendant who,
 - (i) would fairly and adequately represent the interests of the class,
 - (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class . . . , and
 - (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

⁴ S.O. (1992) , c.6 (“CPA”)

⁵ (2005) 78 O.R. (3d) 98

[13] Cullity J. held that the requirements of s.5(1)(a) were determined in favour of the appellants by the decision of Cumming J. in the rule 21 motion, to which I have previously referred. No quarrel is taken with that conclusion.

[14] With respect to the requirements under s.5(1)(b) that there be an identifiable class, Cullity J. considered the following:

1) The definition proposed in the amended statement of claim as follows:

- (a) persons in Canada who have suffered a loss, or were injured, as a result of a fire which occurred after October 1, 1987, where the fire was caused by a cigarette igniting upholstered furniture or a mattress...;
- (b) the estates of persons in Canada who were killed in fires occurring after October 1, 1987, where the fire was caused by a cigarette igniting upholstered furniture or a mattress...; and
- (c) persons including, but not limited to, executors, administrators, personal representatives, spouses and relatives who, on account of a relationship to those persons described in the above defined class, have a derivative claim for damages....

2) The definition contained in the amended notice of motion, as follows:

- (a) persons in Canada who suffered a loss, or were injured, as a result of a fire which occurred after 1st October, 1987, who claim that the fire was caused by an ITCL brand cigarette igniting upholstered furniture or a mattress ...;
- (b) the estates of persons in Canada who were killed in fires occurring after October 1, 1987, who claim that the fire was caused by an ITCL brand cigarette igniting upholstered furniture or a mattress...;
- (c) persons including, but not limited to, executors, administrators, personal representatives, spouses and relatives who, on account of a relationship to those persons described in the above defined class(es), have derivative claim for damages

- 3) Two alternative definitions submitted by the appellants' counsel on the motion as follows:
- (a) Persons in Canada who suffered personal injury, death and/or property loss after October 1, 1987 as a result of a lit ITCL cigarette igniting upholstered furniture or a mattress;
 - (b) the estates of persons described in paragraph (a) above;
 - (c) [persons with derivative claims]
- ...
- (a) Persons in Canada who suffered personal injury, death and/or property loss after October 1, 1987 arising from an upholstered furniture or a mattress fire, where the use of a lit ITCL cigarette was contemporaneous to the fire;
 - (b) the estates of persons described in paragraph (a) above;
 - (c) [persons with derivative claims]

[15] After a thorough review of the authorities, including *Chadha et al. v. Bayer Inc. et al.*⁶ Cullity J. found that all the definitions proposed were “unacceptably merits-based in the sense identified in the previous decisions I have mentioned and, in the case of that contained in the amended notice of motion, unacceptably subjective” (see reasons paragraph 38).

[16] In paragraph 47 of his reasons, Cullity J. concluded that “I do not believe this is a case where I should struggle to find a definition that would satisfy the reasoning in the authorities I have cited, or properly allow certification on condition of the definition of a class would be amended”, referring to the decision of Winkler J., as he then was, in *Caputo v. Imperial Tobacco Limited*⁷.

⁶ (2003), 63 O.R. (3d) 22 (C.A.)

⁷ (2004), 44 C.P.C. (5th) 350

[17] Cullity J. went on to consider the other requirements for certification on the assumption that the first of the alternative definitions previously referred to would be an acceptable definition of the class.

[18] The common issues proposed on behalf of the appellants were as follows:

- 1) whether the defendant owed a duty of care to the Class to design, manufacture and market cigarette products that are “fire safe” and to phase out its conventional cigarettes and, if so, when did these duties arise and what is the scope of such duties?
- 2) whether the defendant breached either or both of these duties by selling only defective cigarettes, giving rise to liability to members of the Class;
- 3) whether it is appropriate to determine the degree of the defendant’s contributory negligence on a class-wide basis in accordance with section 4 of the *Negligence Act* of Ontario (and similar legislation in other provinces); and
- 4) whether the defendant’s conduct warrants the imposition of a global award of punitive damages and, if so, in what manner.

[19] In paragraph 52 of his reasons Cullity J. concluded in part:

If it was open to me to accept the first of the alternative class definitions proposed at the hearing, I am satisfied that there would be the required rational connection between that definition and common issues #s 1 and 2 and that such issues would have the necessary attributes of commonality in that they would be essential ingredients of each class member’s claim. The reference in issue # 2 to liability arising would, however, have to be deleted as that would be dependent, in respect to each class member, not only on proof of harm to persons or property, but also on whether the fire was caused by the breach of duty: namely, whether it would not have occurred if the ignition source was a fire safe cigarette.

[20] With respect to the proposed common issue # 3 Cullity J. held in part at paragraph 53 of his reasons:

I would not accept proposed common issue #3. As framed, it seeks to relieve the motions judge of the task of determining whether commonality exists – and to transfer it to the judge at trial. The identification of common issues is required to be made on a motion to certify the proceedings and not later: *Caputo*, at para 56. I am satisfied that the answer to the question posed by common issue #3 is that the possible application of section 4 of the *Negligence Act* cannot be appropriately determined on a class-wide basis.

[21] With respect to common issue #4, at paragraph 55, Cullity J. held on the basis of *Rumley v. British Columbia*⁸ that an award of punitive damages on a class-wide basis may often be appropriate and that, if the case was to be certified in respect of common issues #1 and 2, proposed common issue #4 could be accepted.

[22] Cullity J. dealt with ss.5(1)(d) – preferable procedure and 5(1)(e) - a workable litigation plan in paragraphs 58 through 79 of his reasons. In paragraph 60 he found in part as follows:

In this case, while proposed common issues #'s 1 and 2 are important, and central, to the claim of each of the supposed class members – and, no doubt, raise questions of some scientific interest and considerable difficulty – their resolution would in my opinion simply mark the commencement of the litigation in which separate – and in some cases – lengthy – trials would be necessary to determine, in respect of each individual claim, not only the preliminary question of causation – whether damage was caused by an ITCL cigarette igniting upholstered furniture or a mattress – but also, whether such fire was caused by the defendant's failure to market only fire-safe cigarettes. As the concept of a fire-safe cigarette is a relative one, and it is not disputed that even such a cigarette could cause a fire, it would be necessary to decide in respect of each class member's claim whether a fire would have occurred in the particular circumstances if a fire-safe cigarette would have been involved.

[23] Further in paragraph 64 Cullity J. found that a decision on the common issues proposed would not resolve the question of a causal link between a breach of duty and the actual fires that may have occurred. That would have to be determined on a claim by claim basis.

⁸ (1999), 180 D.L.R. (4th) 639 B.C.C.A.; (2001), 205 D.L.R. (4th) 39 S.C.C.

[24] At paragraph 68 Cullity J. found in part:

The number of the individual issues that would determine the defendant's liability – and the diversity of the evidence that would be relevant to each claim – are such that, unless the plaintiffs could produce a satisfactory litigation plan for dealing with the issues, I would not consider the proceedings amenable to certification.

[25] Cullity J. held that the plan proposed by the appellant was “quite inadequate” and that the appellants had not met the burden of demonstrating that class proceedings would provide an efficient and manageable method of resolving the claims of class members (para 76).

[26] Cullity J. found “most fundamentally, and remarkably, [the proposed plan] would deny the defendant any input into the resolution of individual issues, let alone recourse to any of the procedural safeguards to which it would be entitled in individual actions”.

[27] Cullity J. concluded at the end of his analysis of the requirements of s.5(1) that even if the appellants had satisfied the requirement that there be an identifiable class, he would not certify the proceedings.

COSTS ORDER

[28] Counsel for the parties made submissions to Cullity J. with respect to costs for both the summary judgment and certification motions. On the summary judgment motion, Cullity J. declined to award the appellants substantial indemnity costs but awarded costs on a partial indemnity basis. He reduced the fees claimed by the appellants but awarded all of their substantial disbursements. With respect to the certification motion Cullity J. declined to award the successful respondent its costs holding that the proposed class action sufficiently engaged the public interest for the purposes of s.31 of the CPA.

ISSUES

Certification

[29] The appellants submit that Cullity J. erred in finding that this case did not meet the requirements of s.5(1) of the CPA by:

- 1) failing to find an identifiable class;
- 2) failing to find that the preferable procedure requirements were met by:
 - (a) finding the resolution of the common issues would mark only the commencement of the litigation, rather than finding that the resolution of these issues would move the litigation forward significantly; and
 - (b) overstating the importance of the individual issues that would remain for individual adjudication; and
 - (c) holding that the plaintiffs' litigation plan was unworkable.

Costs

[30] The respondent submits the following issues arise on the cross-appeal:

- 1) Did Cullity J. err in finding the litigation involved a matter of public interest pursuant to s.31 of the CPA?
- 2) If so, did Cullity J. err in failing to set off the costs of the motion for summary judgment against those of the certification motion?
- 3) Did Cullity J. err in permitting the plaintiffs to allocate 80% of their time and disbursements to the summary judgment motion, rather than an equal allocation between the two motions?

STANDARD OF REVIEW

[31] I accept that the general test on appeal is that findings of law are open to review by this court and are subject to a standard of correctness. Findings of fact may not be overturned unless a judge below made a palpable and overriding error⁹.

[32] For some years jurisprudence arising under the CPA has required reviewing courts to give deference to the motion judges who have developed expertise in what has been termed a very sophisticated area of practice¹⁰. Eight years later, Winkler, C.J.O. put the matter of deference this way when writing on behalf of the court in the recent decision of *Cassano v. Toronto Dominion Bank*¹¹ at p.409:

[23] The motion judge is an experienced class action judge. His decision is entitled to substantial deference: see *Markson v. MBNA Canada Bank* (2007), 85 O.R. (3d) 321, [2007] O.J. No. 1684 (C.A.), at para. 33, leave to appeal to S.C.C. refused [2007] S.C.C.A. No. 346. The intervention of this court should be limited to matters of general principle: see *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401, [2004] O.J. No. 4924 (C.A.), at para. 39, leave to appeal to S.C.C. refused [2005] S.C.C.A. No. 50. However, legal errors by the motion judge on matters central to a proper application of s. 5 of the CPA displace the deference usually owed to the certification motion decision: see *Hickey-Button v. Loyalist College of Applied Arts & Technology*, [2006] O.J. No. 2393, 267 D.L.R. (4th) 601 (C.A.), at para. 6.

[33] Before proceeding with the analysis, two general comments should be made. First, Cullity J. is a very experienced class action judge. Second, the submission of the appellants that the decision of the Court of Appeal in *Pearson v. Inco Ltd*¹² has signalled a “shift in the legal

⁹ *Amertek Inc. et al. v. Canadian Commercial Corp.* (2005), 76 O.R. (3d) 241 (C.A.)

¹⁰ *Anderson v. Wilson* (1999), 44 O.R. (3d) 673 at page 677

¹¹ (2007), 87 O.R. (3d) 401

¹² (2005), 78 O.R. (3d) 641 (C.A.)

landscape” and that if Cullity J. had followed the legal approach outlined in that case his decision on certification would have been different, must be viewed through the following lens.

[34] In *Pearson* the court referred to the more liberal approach to be taken to certification of class proceedings that came from its decision in *Cloud v. Canada*.¹³ In *Cloud* the Court of Appeal overturned a decision of the Divisional Court and allowed certification. In doing so it approved of the dissenting reasons and the approach taken by the dissenting judge. That judge was Cullity J. As a result, I would have thought that Cullity J. was in a unique position to understand the ramifications of *Cloud* as followed in *Pearson*, as the genesis for the new approach was in his dissenting judgment.

[35] I turn to the findings made by Cullity J. with respect to subsections (b) through (e) of s.5(1).

SECTION 5(1)(b) – THE EXISTENCE OF A CLASS

[36] The appellants submit that Cullity J. incorrectly found that he was bound by authorities which mandated a rejection of class definitions which were merit based. I disagree.

[37] Cullity J. exhaustively analyzed through 42 paragraphs of his reasons the class definitions proposed by the appellants. He was aware of and referred to, all of the leading authorities before concluding that the proposed definitions were unacceptably merit based and that they must be rejected because the definitions depended upon the resolution of a number of issues which would have to await the outcome of a trial for determination. Those findings are essentially findings of

¹³ (2004) 73 O.R. (3d) 401 (C.A.)

fact that are based on the evidentiary record before the motions judge and can only be reviewed on a standard of palpable and overriding error. I can find no such error.

[38] In their factum, the appellants propose 2 new definitions that were not before Cullity J. and to which the respondent had no opportunity to respond. The first definition is as follows:

persons who occupied real property where a Smoking Related Fire occurred (at the time of the Smoking Related Fire) (“Primary Claimants”);

family members of Primary Claimants who are entitled to assert a derivative claim for damages pursuant to the *Family Law Act*, R.S.O. 1990, c. F.3, as amended, or similar legislation in other provinces or territories (“Family Law Claimants”);

personal representatives of the estates of Primary Claimants (“Estate Claimants”).

[39] “Smoking Related Fire” was defined as follows:

A fire which occurred in Canada between October 1, 1987 and October 1, 2005 in respect of which any written report by a fire department, fire marshal, or other fire investigator (including an insurance adjuster) (“Investigator’s Report”), indicates that a cigarette did cause or contribute to the fire or may have caused or contributed to the fire (or was at least a possible cause), except fires where the Investigator’s Report indicates that a cigarette other than an ITCL cigarette did cause or contribute to the fire or may have caused or contributed to the fire.

[40] The second new definition is as follows:

persons in Canada who, between October 1, 1987 and October 1, 2005, purchased and/or used an ITCL brand cigarette who claim to have suffered personal injuries and/or property damage as a result of a house fire, and any other persons who claim to have suffered personal injuries and/or property damage as a result of a house fire (“Primary Claimants”);

personal representatives of the estates of Primary Claimants, as well as persons killed in house fires (“Estate Claimants”);

family members of Primary Claimants who are entitled to assert a derivative claim for damages pursuant to the *Family Law Act*, R.S.O. 1990, c. F.3, as amended, or similar legislation in other provinces or territories (“Family Law Claimants”).

[41] “House fire” was defined to include “any fire involving any building”.

[42] In my opinion, submitting entirely fresh definitions on appeal is not appropriate. It is significantly different from what has happened in the past where a reviewing court has reworked by narrowing in scope an existing definition that was placed before the motion judge.

[43] Regardless, with respect to the first new definition I accept the respondent’s submission that it, not mandating that a fire occur on upholstered furniture or on a mattress, bears no rational relationship to the proposed common issues.

[44] I also accept the respondent’s submission with respect to the second new definition that it is even less connected to the proposed common issues and does not require that the cigarette manufactured by the respondent start the fire. As submitted by counsel for the respondent, under the proposed second definition “a person who purchased (the respondent’s) cigarette, whose house was burned down by a damaged fuse box would be in the class, as would the smoker of the respondent’s cigarettes whose house was burned by an arsonist.”

[45] In my opinion Cullity J. was correct in determining that none of the proposed class definitions is acceptable by reason of their containing merit-based definitions, but were also unacceptably subjective and accordingly denying certification on those grounds.

SECTION 5(1)(c) – COMMON ISSUES

[46] Both parties accept Cullity J.'s findings with respect to the first and second common issues proposed.

SECTION 5(1)(d) AND SECTION 5(1)(e) – PREFERABLE PROCEDURE AND A WORKABLE LITIGATION PLAN

[47] The main submission by the appellants is that a class action is the preferable procedure as individual actions will be too expensive for most if not all of the class members. Counsel submitted that a class action “has to be the preferable procedure because it is the only procedure”.

[48] In paragraph 78 of his reasons, Cullity J. concludes in part as follows:

... while proof of a breach of a duty of care would be an essential step in establishing liability, the plaintiffs have not persuaded me that, notwithstanding the existence of the disputable individual issues that would remain, such proof would sufficiently achieve the objectives of access to justice, or judicial economy. The procedure under the CPA is not appropriate, or available, in every case where there are common issues.

[49] In my opinion Cullity J. was correct in rejecting that submission on the basis that to do otherwise would mean that if an individual lawsuit would not be viable a workable class proceeding has to be considered to be a preferable procedure. Such a finding would ignore the provisions of specific requirements of s.5(1).

[50] What permeates Cullity J.'s carefully reasoned decision on these points is his finding that the individual issues that would have to be determined in each case simply overwhelm any benefit that may be available by a determination of the 2 common issues. The wealth of causation issues that remain to be determined in each case, as discussed by Cullity J., when added to the

other issues of contributory negligence, limitations, *volenti non fit injuria* and potential third party claims amply support the conclusion that long and complex individual trials will necessarily result even after common issues have been determined. There was ample evidence before Cullity J. to support that conclusion.

CONCLUSION

[51] The motions judge refused to certify the proceedings under the CPA on the basis that the appellants failed to meet all the requirements for certification. His reasons are summarized in paragraphs 15 to 27 of this judgment.

[52] In essence, Cullity J. found that the proposed class definition was fatally merit-based, that a class action was not the preferable procedure and that the litigation plan proposed would deny the defendant fundamental fairness and recourse to procedural safeguards.

[53] In my opinion the appellants have not demonstrated any error of law committed by Cullity J., nor have they demonstrated any palpable or overriding error in the fact finding process, so as to warrant intervention in the findings of the motions judge by this court.

[54] Accordingly, the appeal is dismissed.

THE CROSS-APPEAL

[55] In an endorsement dated May 3, 2005, Cullity J. awarded costs on the summary judgment motion to the plaintiff (respondents in that motion). He later fixed those costs at \$323862.61. In an endorsement dated March 10, 2006, he declined to award costs to the successful respondents on the certification motion. In the cross-appeal, ITCL argued that the motion judge erred in

failing to grant costs of the certification motion and in failing to order that the costs of one motion be set-off against the costs of the other motion.

[56] Orders dealing with costs are afforded considerable deference. Leave to appeal under rule 61.03(8) is granted only where there are “strong grounds upon which the appellate court could find that the judge erred in exercising” the discretion.¹⁴

[57] In 2005, Cullity J. heard the summary judgment motion over 5 days and later he heard the certification motion over 3 days. His reasons for decision consist of 70 paragraphs and 80 paragraphs respectively. He wrote a detailed endorsement on both costs decisions.

[58] Cullity J. had opportunities to assess the extent to which fees and disbursements ought to be allocated to one motion or the other. While the certification motion was dismissed, his finding that the public interest was engaged is demonstrated by the enactment of legislation by Parliament that deals with the very issue in the case. He was uniquely situated to make the costs order on the certification motion taking into consideration the earlier costs disposition. I am not persuaded that there are “strong grounds” to find that he erred in exercising his discretion. I decline to grant leave to appeal.

COSTS OF THE APPEAL AND THE CROSS-APPEAL

¹⁴ *Yakubuski v. Yakubuski Estate* [1988] 31 O.A.C. 257 (Div.Ct.)

[59] In default of agreement as to costs, the plaintiffs/appellants may make brief written submissions within 14 days of the release of these reasons, and the defendant/respondent within 10 days after service of the submissions of the plaintiff/appellants.

JENNINGS J.

PITT J.

KITELEY J.

Released:

DIVISIONAL COURT FILE NO.: 467/05
COURT FILE NO.: 00-CV-183165 CP
DATE:20080430

**ONTARIO
SUPERIOR COURT OF JUSTICE**

DIVISIONAL COURT

JENNINGS, PITT and KITELEY JJ.

B E T W E E N:

JASMINE RAGOONANAN and PHILIP
RAGOONANAN by their estate representative
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BABOOLAL

Plaintiffs
(Appellants)

- and -

IMPERIAL TOBACCO CANADA LIMITED

Defendant
(Respondent)

- and -

DAVINA RAGOONANAN and RONALD
BALKARRAN

Third Parties

REASONS FOR JUDGMENT

JENNINGS J.

RELEASED: April 30, 2008