

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

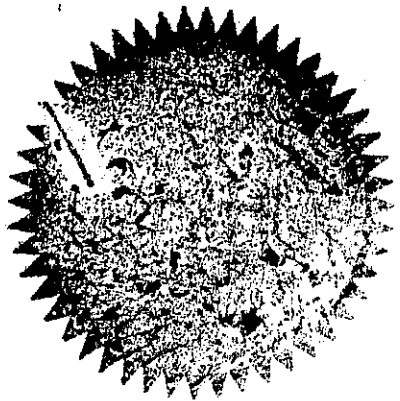
KAM-TIM TONG and ROBIN CHATTERJEE

Plaintiffs

- and -

ATTORNEY GENERAL OF ONTARIO

Defendant



Proceedings commenced pursuant to the *Class Proceedings Act, 1992*, S.O. 1992, c. 6.

STATEMENT OF CLAIM

TO: THE DEFENDANTS

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a Statement of Defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the Plaintiff's lawyer or, where the Plaintiff does not have a lawyer, serve it on the Plaintiff, and file it, with proof of service, in this court office, **WITHIN TWENTY DAYS** after this Statement of Claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your Statement of Defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a Statement of Defence, you may serve and file a Notice of Intent to Defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your Statement of Defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE

GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. If you wish to defend this proceeding but are unable to pay legal fees, legal aid may be available to you by contacting a local Legal Aid office.

DATE: ^H March 7, 2005

Issued by: Y. Grant
Local Registrar

Address of
Court office: 393 University Avenue, 10th floor
Toronto, Ontario
M5G 1E6

TO: **The Attorney General of Ontario**
720 Bay Street
8th Floor
Toronto, Ontario
M5G 2K1

CLAIM

1. The Plaintiffs claim on their own behalf and on behalf of all of the members of the Class (as defined below):
 - (a) an Order certifying this proceeding as a class proceeding and appointing the Plaintiffs as representative Plaintiffs for the members of the Class (as defined below) and any appropriate sub-class thereof;
 - (b) an Order consolidating this proceeding together with Application No. 66991/03 commenced by the Attorney General of Ontario against Robin Chatterjee;
 - (c) a declaratory Order that the *Remedies for Organized Crime and Other Unlawful Activities Act, 2001*, S.O. 2001, Chapter 28 (the "*Civil Remedies Act*") is unconstitutional for being, *inter alia*,
 - (i) *ultra vires* the province of Ontario for the substance of the statute falls within the jurisdiction of the Government of Canada under, *inter alia*, the criminal law power set out in s. 91 of the *Constitution Act, 1867*, and
 - (ii) contrary to and infringing upon ss. 7, 8 and 11 of the *Canadian Charter of Rights and Freedoms* and cannot be justified under s.1;
 - (d) an Order requiring the Attorney General of Ontario to provide a full accounting of:
 - (i) all actions and applications for forfeiture commenced in Ontario pursuant to the *Civil Remedies Act* since the Act was given royal assent, including the names, addresses and contact information of all named Respondents to those actions and applications;
 - (ii) the status of all the actions and applications, including those actions and applications which were defended, undefended, settled, successful or unsuccessful,
 - (iii) all monies, proceeds, property and/or instruments seized and sought to be forfeited to the Attorney General of Ontario as part of all the actions and applications, and
 - (iv) all monies, proceeds, property and/or instruments forfeited to the Attorney

General of Ontario as a result of all successful actions, applications or settlements, including the total amount of monies, proceeds, property and/or instruments received by the Attorney General of Ontario and how those monies, proceeds, property and/or instruments were dealt with or disbursed by the Attorney General of Ontario,

- (e) a declaratory Order that any monies, proceeds, property and/or instruments seized and/or forfeited to and received by the Attorney General of Ontario as a result of actions, applications or settlements commenced under the *Civil Remedies Act* amounts to an unjust enrichment which must be disgorged ;
- (f) general damages for conversion in the amount of \$100,000,000.00
- (g) damages equivalent to the total amount of all monies, property, proceeds and/or instruments seized and/or forfeited to the Attorney General of Ontario as a result of all successful actions, applications or settlements under the *Civil Remedies Act*;
- (h) special damages equivalent to the total amount of all legal expenses the Plaintiffs and the members of the Class have paid in defending and responding to all actions and applications commenced by the Attorney General of Ontario under the *Civil Remedies Act*;
- (i) prejudgment and post judgment interest pursuant to the *Courts of Justice Act*, R.S.O. 1990, c. 43, as amended where applicable;
- (j) costs of this action on a substantial indemnity basis together with any applicable Goods and Services Tax payable pursuant to the *Excise Tax Act*, R.S.C. 1990. C. E-15; and
- (k) such further relief as counsel may request and this Honourable Court deems just.

The Parties

2. The Plaintiffs Robin Chatterjee ("Chatterjee") and Kam-Tim Tong ("Tong") reside respectively in the town of Thornhill and city of Toronto, both in the province of Ontario.

3. The Defendant Attorney General of Ontario ("AGO") is a Ministry of the province of Ontario responsible for, *inter alia*, ensuring that the administration of public affairs is in accordance with the law of Ontario. At all material times, the AGO was responsible for administering and commencing actions and applications under the *Remedies for Organized Crime and Other Unlawful Activities Act, 2001*, S.O. 2001, Chapter 28 (the "*Civil Remedies Act*") through its Civil Remedies for Illicit Activities Branch.

The Civil Remedies Act - A General Overview

4. Under the *Civil Remedies Act*, "unlawful activity" is defined as an act or omission that
 - a) is an offence under an Act of Canada, Ontario or other province/territory of Canada; or,
 - b) is an offence under an Act of a jurisdiction outside Canada is a "similar act or omission" would be an offence under an Act of Canada or Ontario if it were committed in Ontario.
5. The Act defines (i) "proceeds of unlawful activity" as any property acquired, directly or indirectly, in whole or in part, as a result of unlawful activity, whether acquired before the Act came into force, and (ii) "instruments of unlawful activity" as property that is likely to be used to engage in unlawful activity that, in turn, would be likely to or is intended to result in the acquisition of other property or in serious bodily harm to any person.
6. The AGO may seek forfeiture of a proceed and/or instrument of an unlawful activity by way of Application commenced in the Ontario Superior Court of Justice. However, all findings of fact under the Act shall be made on a balance of probabilities, meaning that if a court is satisfied on a balance of probabilities that the subject money or item is a proceed or instrument of an unlawful activity, the court shall order the property forfeited to the AGO.
7. The Act provides for two exceptions to forfeiture of property, namely (i) where it is

clearly not in the interests of justice, or (ii) where there is a proven legitimate owner claim. A "legitimate owner" is defined as a person who did not, indirectly or directly acquire the property as a result of committing an unlawful activity and who

- (a) was the rightful owner of the property before the unlawful activity occurred and was deprived of possession or control of the property by means of the unlawful activity,
- (b) acquired the property for fair value after the unlawful activity occurred and did not know and could not reasonably have known at the time of the acquisition that the property was proceeds of unlawful activity, or
- (c) acquired the property from a person mentioned in clause (a) or (b).

8. Only a named Respondent party to an application for forfeiture commenced by the AGO can seek "legitimate owner" status.

9. In proceedings brought under the Act, proof that a person was convicted, found guilty or found not criminally responsible on account of mental disorder in respect of an offence is proof that the person committed the offence. However, an offence may be found on a balance of probabilities to have been committed even if (i) no person has been charged with the offence, or (ii) a person was charged with the offence but the charge was withdrawn or stayed or the person was acquitted of the charge.

The Applications for Forfeiture

a) Tong

10. On June 8, 2003, Tong was a passenger in a vehicle being driven by Hien Chow ("Chow") along the Trans Canada Highway in Nipigon, Ontario. At approximately 9:30 p.m., Chow's vehicle was stopped by a police officer participating in a R.I.D.E. program.

11. The police officer wished to conduct a stop-check of the vehicle, which by law was

limited to the purpose of the R.I.D.E. program, i.e. appropriate license documentation, ownership/insurance, vehicle safety and driver competence. Although there was no evidence that either Chow or Tong were in contravention of any law or other R.I.D.E. concern, the police officer sought to expand the scope of her search and asked Chow whether she could search the trunk of the vehicle. At no time was Chow advised by the police officer that he had a right to refuse such a request.

12. Despite Chow agreeing to the request, he did not give lawful consent. The police officer searched the trunk of the vehicle and allegedly found two plastic bags containing two pairs of blue jeans, three tee-shirts and one closed green suitcase.
13. Without seeking Chow or Tong's consent to open the suitcase, the police officer opened it and found one black leather jacket, one pair of jeans and one closed silver gift bag with a closed small plastic bag on top.
14. Once again, without seeking Chow or Tong's consent to open the gift bag, the police officer opened it and found \$78,000.00 CAD in cash, which belonged to Tong. The police officer seized the \$78,000.00 CAD in cash from the vehicle. Chow and Tong were then advised to continue on their way.
15. AGO thereafter commenced an application against Chow and Tong seeking forfeiture of the \$78,000.00 CAD. In its materials, the AGO alleged that the \$78,000.00 CAD was the proceed or instrument of unlawful activity, specifically the offence of drug trafficking. The supporting affidavits of the police officers alleged that Chow and Tong were likely engaged in drug trafficking because:
 - a) drug trafficking is often done by couriers travelling long distances
 - b) there was litter in the vehicle
 - c) there was minimal luggage in the vehicle
 - d) Chow and Tong each had cell phones on them, and
 - e) the vehicle was rented

16. At no time were Chow or Tong ever investigated or charged with respect to the possession, trafficking, importing, exporting, production or cultivation of marihuana or other substance under the *Controlled Drugs and Substances Act*, R.S.C. 1996, c. 19. In addition, there were no drugs or drug-related paraphernalia in the vehicle.

17. As the money belonged to Tong, and he was made a respondent to the AGO's application he was forced to rely upon section 3(3) of the *Civil Remedies Act* and claim "legitimate owner" status.

18. The AGO's application was heard on December 11, 2003 in Thunder Bay before the Honourable Mr. Justice David Crane. Mr. Justice Crane found that the provisions of the *Civil Remedies Act* required (i) the AGO to prove a "*prima facie*" case of forfeiture, namely that in the face of no responding evidence the seized items were proceeds or instruments of an unlawful activity, but conversely (ii) Tong to prove that he held a legitimate ownership interest in the \$78,000.00 CAD, i.e. that he was a person who did not, indirectly or directly acquire the money as a result of committing an unlawful activity and who (a) was the rightful owner of the money before the unlawful activity occurred and was deprived of possession or control of the money by means of the unlawful activity, and (b) acquired the money for fair value after the unlawful activity occurred and did not know and could not reasonably have known at the time of the acquisition that the money was proceeds of unlawful activity.

19. Using the civil standard required by the *Civil Remedies Act*, Mr. Justice Crane found that the AGO discharged its onus and Tong did not, and ordered that the \$78,000.00 CAD be forfeited to the AGO.

b) Chatterjee

20. On March 27, 2003, Chatterjee's vehicle was stopped by police in Thornhill, Ontario for allegedly driving without a license plate. Chatterjee was driving the vehicle which he

owned. When running his name through its computer system, the police officers learned that Chatterjee was currently on a recognizance of bail which required him to reside in Ottawa, Ontario.

21. Despite his efforts to explain to the police officers that he was simply in the process of moving back to his parents' house in Thornhill, Ontario for the summer after the conclusion of the university year, the police placed Chatterjee under arrest for breach of recognizance.
22. Chatterjee was forced into the back seat of a police cruiser. His vehicle, including the trunk, was then searched without even an attempt by the police officers to secure Chatterjee's consent to such a search. During the unauthorized search, the police officers opened Chatterjee's knapsack, which had been zipped up, and removed \$29,020.00 CAD in cash from therein. The officers continued to search the trunk of the vehicle and found one light ballast, one light socket and an exhaust fan.
23. The police officers seized all of the aforementioned items, including the \$29,020.00 CAD belonging to Chatterjee. Chatterjee was then driven to the District #2 police station, and thereafter spent seven days in the West Correctional Facility. Chatterjee was charged with breach of recognizance, and that charge was ultimately withdrawn by the Crown.
24. On May 13, 2003 the AGO brought a motion for interim preservation of the seized items pursuant to sections 4(1) and 9(1) of the *Civil Remedies Act*. In its materials, the AGO alleged that the seized items (including Chatterjee's \$29,020.00 CAD) were proceeds and instruments of unlawful activity, and specifically the offences of cultivation and sale of marihuana. The supporting affidavits of the police officers alleged that (i) the \$29,020.00 CAD "had a strong odour of marihuana", and (ii) in their opinion, the other items found in the trunk of Chatterjee's vehicle were believed to be used in the cultivation of marihuana.

25. At no time was Chatterjee ever investigated or charged with respect to the possession, trafficking, importing, exporting, production or cultivation of marihuana or other substance under the *Controlled Drugs and Substances Act*, R.S.C. 1996, c. 19.
26. At the return of the motion (May 13, 2003), Chatterjee did not have counsel and did not appear at the hearing of the motion. The Honourable Madam Justice Klowak granted the AGO's motion, and the seized items (including Chatterjee's \$29,020.00 CAD) have been held by the AGO ever since.
27. On May 16, 2003, the AGO commenced an application against Chatterjee seeking forfeiture of the seized items pursuant to sections 3(1) and 8(1) of the *Civil Remedies Act* ("Application No. 66991/03" as referred to in paragraph 1(b) herein).
28. Chatterjee subsequently retained counsel. Prior to the return of the AGO's application for forfeiture, Chatterjee brought a constitutional challenge seeking, *inter alia*, a declaratory Order that the *Civil Remedies Act* was unconstitutional as (i) infringing upon sections 7, 8 and 11 of the *Canadian Charter of Rights and Freedoms* without justification under section 1, and (ii) *ultra vires* the jurisdiction of the province of Ontario.
29. Chatterjee's constitutional challenge was heard in Newmarket on October 26-29, 2004 before the Honourable Mr. Justice Ernest Loukidelis. As of the date of this claim, Mr. Justice Loukidelis has yet to release a decision with respect to Chatterjee's constitutional challenge.

The Civil Remedies Act is Unconstitutional

30. As already raised in great detail by Chatterjee in his constitutional challenge in Application No. 66991/03, the Plaintiffs claim that the *Civil Remedies Act* is unconstitutional for, *inter alia*, the following reasons:
 - a) its pith and substance falls within the jurisdiction of the Government of Canada

under, *inter alia*, the criminal law power set out in s. 91 of the *Constitution Act, 1867*;

- b) it infringes upon section 7 of the *Canadian Charter of Rights and Freedoms* by threatening the mental integrity of the person and using the prospect of punishment to restrict a person's privileges
- c) it infringes upon section 8 of the *Canadian Charter of Rights and Freedoms* by allowing the state to violate a person's reasonable expectation of privacy in order to determine whether grounds for a civil forfeiture application exist, rather than whether an offence has or will be committed
- d) it infringes upon section 11 of the *Canadian Charter of Rights and Freedoms* by:
 - i) requiring a trier of fact to determine the presence of elements of criminal offences on the civil standard of a balance of probabilities as opposed to the constitutionally mandated standard of proof beyond a reasonable doubt
 - ii) creating a reverse onus upon a respondent to seek "legitimate owner" status, i.e. a person must prove that he/she did not indirectly or directly acquire the property as a result of committing an unlawful activity
 - iii) empowering a trier of fact to find an offence having been committed on a balance of probabilities and make an order forfeiting proceeds and/or instruments relating to alleged "unlawful activity" to the AGO, when a person may never have been charged with any criminal offence
 - iv) empowering a trier of fact to find an offence having been committed on a balance of probabilities and make an order forfeiting proceeds and/or instruments relating to alleged "unlawful activity" to the AGO, even where a person was charged with that offence and the charge was withdrawn or stayed or the person was acquitted of the charge
 - v) authorizing the use by the state of a criminal and/or quasi-criminal process in the absence of the necessary constitutional protections that govern criminal and/or quasi-criminal proceedings and process

The Remedies Sought Herein

31. The Plaintiff state that as the *Civil Remedies Act* is unconstitutional for the reasons set out herein, monies, proceeds, property and/or instruments seized by and/or forfeited to the AGO by way of actions, applications or settlements commenced under the *Civil Remedies Act* since its inception amount to an unjust enrichment.
32. The Plaintiffs therefore rely upon the doctrine of unjust enrichment in support of the relief claimed in paragraph one herein, including an Order requiring the AGO to repay monies, proceeds, property and/or instruments seized by and/or forfeited to the AGO by way of actions, applications or settlements commenced under the *Civil Remedies Act* to the Class.
33. The Plaintiffs further state that the as the AGO had no colour of right to any of the monies, proceeds, property and/or instruments seized by and/or forfeited to the AGO by way of action, applications or settlements commenced under the *Civil Remedies Act*, the AGO is liable for the tort of conversion and all resulting damages.
34. As Chatterjee's constitutional challenge to the *Civil Remedies Act* has already occurred and is presently under reserve the Plaintiffs seek an Order consolidating the within proceeding with Action No. 66991/03.

The Representative Plaintiffs

35. As previously stated, both Tong and Chatterjee were Respondents to applications for forfeiture commenced by the AGO pursuant to the *Civil Remedies Act*. Tong's \$78,000.00 CAD was forfeited to the AGO, while Chatterjee's \$29,020.00 CAD was seized and is being preserved by the AGO pending the outcome of his constitutional challenge and, if necessary, the return of Application No. 66991/03.

The Class

36. The Plaintiffs bring this action on their own behalves and on behalf of all persons resident in Canada whose monies, proceeds, property and/or instruments were seized by and/or forfeited to the AGO pursuant to actions, applications or settlements commenced under the *Civil Remedies Act*

37. The Plaintiff propose that this action be tried at the City of Toronto, in the Province of Ontario.

March 7, 2005

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Solicitors for the Plaintiffs

KAM-TIM TONG and ROBIN CHATTERJEE

- and -

ATTORNEY GENERAL OF ONTARIO

Plaintiffs

Defendant

Short Style of Proceeding

OTTAWA - 2

05-CV-285439

Court File No.

2/P

SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

Proceedings commenced pursuant to the *Class Proceedings Act*,
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STATEMENT OF CLAIM

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