A.G. Ontario v. Kittiwake Sailboat: Civil Forfeiture hits a reef

By Jacob Stilman

A recent decision of the Superior Court of Ontario has thrown some much needed cold water on the Attorney General's increasing abuse of the Civil Remedies Act, a particularly nasty piece of legislation that has bestowed broad powers upon the government to seize real property and chattels from individuals who are suspected of criminal activity.

In the case of _A.G. Ontario v Kittiwake Sailboat_, 2015 ONSC 6106 (CanLII), Justice David Corbett swung the boom on the government, knocking its argument right into the drink.

The case involved the government's attempted seizure under the Civil Remedies Act of a sailboat owned by Valentin Chygyrynskyy. While intoxicated, Chygyrynskyy ran his 25-foot sailboat into another vessel. He fell overboard into Lake Ontario and had to be fished out by a passing patrol boat. His blood alcohol was well above the lawful limit and he faced charges of impaired operation of a vessel. The civil remedies division of the Attorney General decided that this was an appropriate case for civil forfeiture on the theory that the legislation authorized the seizure of any item of "instrument" (ie. the sailboat) that was used in the course of "unlawful activity" (the impaired operation offence.) Had the application been successful, this would have expanded the interpretation of the act well beyond its original intent.

Justice Corbett adopted a sensible and purposive approach in resolving the case against the A.G. First, the court looked to the intent of the CRA:

"The CRA was intended to target organized crime, persons who make money from criminal conduct, and persons engaged in the most serious of criminal offences. It was never intended to cast such a wide swath as contended for by the A.G. Ontario in this application."

In arriving at this conclusion, Justice Corbett relied in part on the legislative history of the act:

"I am further fortified in this conclusion by the legislative debates when the CRA was enacted. There was debate of drug trafficking and organized crime, but none of impaired driving. The original title of the legislation was Remedies for Organized Crime and Other Unlawful Activities Act, 2001. While this sort of background information is of limited use in construing a statute, it may be considered, and it wholly supports a focused reading of the CRA that does not extend forfeiture to situations such as those presented in this case."

The CRA has, in fact, been amended to permit the seizure and forfeiture of motor vehicles in cases of impaired driving but these amendments did not contemplate the expansive use to which the government was attempting to put it to. Had the A.G. been successful in this case, there would have been almost no limits on the extent to which the public could be vulnerable to Civil Seizure applications.

Consider the case of a sexual assault, taking place in a vehicle: the instrument or property associated with such a criminal act could be seized, even though no one could seriously have contemplated that the vehicle was acquired by the offender specifically as a "rape machine." It could go further than that and any offence occurring inside one's home might also result in civil forfeiture – an assault, a minor act of drug trafficking, criminal possession offences, you name it. If it occurs within the four walls of your home, it could be at risk.

These examples are not fanciful. One can look to the excesses of civil forfeiture that have arisen in the United States to see where this type of legislation can lead. Indeed in Ontario I am aware of at least one case where a motor vehicle that was the setting of an alleged sexual assault was the subject of CRA seizure proceeding. However, now that there is a decision that emphatically states that civil forfeiture is to be resorted to only in cases where the property in question is purposefully integrated into planned and orchestrated criminal activity, there is less likelihood of such prosecutorial abuse occurring.

It can be said that the Kittiwake decision has taken the wind out the government's sails.