

**CITATION:** A.G. Ontario v. Kittiwake Sailboat, 2014 ONSC

**COURT FILE NO.:** CV-13-487378

**DATE:** 20150930

**SUPERIOR COURT OF JUSTICE – ONTARIO**

**BETWEEN:** ATTORNEY GENERAL OF ONTARIO, Applicant

**- and -**

KITTIWAKE SAILBOAT (Registration #50E83594)(in rem), Respondent

**BEFORE:** D.L. CORBETT J.

**COUNSEL:** *James Vlasis*, for the A.G. Ontario (Civil Remedies Branch)

*Michael Dunn*, for the A.G. Ontario (Constitutional Law Branch)

*Mr Chygyrnskyy*, unrepresented, owner of the sailboat

*Justin Safayeni*, *amicus curiae*

**ENDORSEMENT**

[1] The issue on this application is the proposed forfeiture of Mr Chygyrnskyy's leisure-use sailboat under the *Civil Remedies Act* (the "CRA").

[2] For the reasons that follow I conclude that the proposed seizure is not authorized by the CRA. The sailboat shall be returned to Mr Chygyrnskyy forthwith.

**Facts**

[3] On August 4, 2013, Valentin Chygyrnskyy was seen operating his sailboat in Toronto harbour. The sailboat struck a moored power boat. Then Mr Chygyrnskyy was observed falling out of his boat into the water.

[4] The police Marine Unit was dispatched and helped Mr Chygyrnskyy from the water.<sup>1</sup>

[5] Mr Chygyrnskyy provided two breath samples. His readings were 158 mgs and 147 mgs of alcohol per 100 ml of blood. Mr Chygyrnskyy was charged with offences related to impaired operation of a boat.

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<sup>1</sup> Mr Chygyrnskyy swam to shore with the aid of a flotation device thrown to him by his passenger.

[6] Following these events, the AG Ontario obtained a preservation order and applied for forfeiture of Mr Chygyrnsky's sailboat under the *CRA* on the basis that the sailboat is "an instrument of unlawful activity" and "is likely to be used to engage in unlawful activity that, in turn, would be likely to result in serious bodily harm to any person."

[7] It is not alleged that the boat was acquired with the proceeds of crime or that it is used in a criminal enterprise.

### **Summary and Disposition**

[8] The general forfeiture provisions of the *CRA* do not authorize forfeiture of a leisure sailboat because the owner operated it while impaired. 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.

[9] This court does not want to be taken to trivialize the dangers posed by alcohol consumption and water sports. Here, Mr Chygyrnsky's conduct warranted prosecution. It did not warrant seizure of his sailboat or an application under the general forfeiture provisions of the *CRA*.

[10] Accordingly, for the reasons that follow, the application is dismissed.

### **Scheme of the *CRA***

[11] Subsection 8(1) of the *CRA* provides:

In a proceeding commenced by the Attorney General, the Superior Court of Justice shall, subject to subsection (3) and except where it would clearly not be in the interests of justice, make an order forfeiting property that is in Ontario to the Crown in right of Ontario if the court finds that the property is an instrument of unlawful activity.

[12] An "instrument of unlawful activity" is defined in s.7(1) of the *CRA* 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, and includes any property that is realized from the sale or disposition of such property....

Subsection 7(2) provides:

For the purpose of the definition of "instrument of unlawful activity" in subsection (1), proof that property was used to engage in unlawful activity that, in turn, resulted in the acquisition of other property or in serious bodily harm to any person is proof, in the absence of evidence to the contrary, that the property is likely to be used to engage in unlawful activity that, in turn, would be likely to result in the acquisition of other property or in serious bodily harm to any person.

[13] In this case, then, the onus is on the AG Ontario to establish:

- (i) that the boat “is likely to be used to engage in unlawful activity” and
- (ii) that this unlawful activity either
  - a. would be likely to or is intended to result in the acquisition of other property; or
  - b. would be likely to or is intended to result in serious bodily harm to any person.

[14] Likely means “more probable than not”.

[15] “Unlawful activity” is defined in s.7(1) of the *CRA* to mean:

an act or omission that... (a) is an offence under an Act of Canada, Ontario or another province or territory of Canada....

[16] Subsection 7(1) is not a threshold for the exercise of the court’s discretion to grant forfeiture. Forfeiture is mandatory if the conditions of s.7(1) are met, unless such an order “would clearly not be in the interests of justice.” Thus forfeiture will be automatic in all but exceptional cases.<sup>2</sup>

### **Application to this Case**

[17] Impaired operation of a sailboat is an offence under the *Criminal Code of Canada* and therefore is an “unlawful activity” within the meaning of the *CRA*.<sup>3</sup>

#### **(a) Not “Likely” Boat Will Be Used Unlawfully Again**

[18] The onus is on the Crown to show that it is “likely” that the boat will be used for unlawful activity in future. Mr Chygrynskyy has operated his boat once while impaired. There is no evidence that he has done so before.

[19] Mr Chygrynskyy has prior convictions and pending charges for impaired operation of a motor vehicle and related misconduct. I agree that these events may be taken into account in assessing whether Mr Chygrynskyy will re-offend in his sailboat. There is some chance that he will. There may even be a good chance that he will. But I see no basis for concluding that it is more probable than not that he will do so.

[20] Mr Chygrynskyy has said that he plans to sell his sailboat. Given his age and his obvious serious health impairments, this statement of intention seems credible. I assess it as more likely that he will sell the boat than that he will use it again to reoffend.

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<sup>2</sup> *Ontario (A.G.) v. 1140 Aubin Road, Windsor and 3142 Halpin Road, Windsor (in rem)*, 2011 ONCA 363.

<sup>3</sup> *Criminal Code of Canada*, R.S.C. 1985, Ch. C-46, ss. 253(1)(a) and (b).

[21] In any event, Mr Chygrynsky's ownership of the sailboat is lawful. It is not property like a weapon, lights for growing drugs, or premises used exclusively for growing drugs, where the ownership and use of the property is inherently illegitimate, whether generally or in the particulars of the owner's use of the property. There is nothing about the boat itself, or its customary and ordinary use by Mr Chygrynsky, that would lead to an inference that it will "likely" be used for an unlawful purpose in future.

[22] I conclude that the applicant has not met its onus to show that it is "likely" that the sailboat will be used in unlawful activity in the future.

**(b) Not "Likely" that Serious Bodily Harm Will Result**

[23] The events that gave rise to this application did not cause serious bodily harm to any person. Thus the applicant does not have the benefit of the presumption in s.7(2) of the *CRA*.

[24] The applicant has not established that prospective unlawful use of the sailboat will "likely" lead to serious bodily harm to a person. There is some risk that it may. But that is not the test. The test is "likely". The Crown has not come close to establishing this proposition, which strikes me as rather remote. Certainly there is no evidence before me that it is more likely than not that an impaired boater will cause serious bodily injury to a person. The statistics indicate that the risk for motorists is much smaller than 50%, and as a matter of common sense I would suggest that the risks for persons on a leisure sailboat would be much lower still.<sup>4</sup>

[25] The applicant has adduced evidence that forty per cent of fatal boating accidents involve drugs or alcohol. With respect, that evidence is beside the point. It may establish that there is elevated risk associated with impaired operation of a boat. It does not establish that this risk is above 50%, the level required to make serious bodily harm a "likely" consequence.

[26] I appreciate that this mathematical analysis could be seen to trivialize the risks associated with impaired operation of cars and boats. That is not the point here. The probability of serious bodily harm is less than "likely", but the consequences of that risk being realized are unacceptable. Impaired driving, whether of cars or boats, is a serious social harm – it creates no benefit to anyone, and may cause disastrous loss to some. But the seriousness of the consequences does not make those consequences more likely.

[27] A fair reading of the *CRA* leads to the conclusion that it does not cover the sort of situation presented in this case. This is not some failing in the language of the statute. Rather it is because this law was never intended to lead to forfeiture in these circumstances: it was aimed at organized crime and intentional crime undertaken for personal gain. It was not aimed at leisure boating.

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<sup>4</sup> See *Saskatchewan Director, Seizure of Criminal Property Act, 2009*) v. *Lanovaz*, 2014 SKQB 212, para. 25, where R.W. Elston J. calculated the risk at 6.7% in Saskatchewan, well below the standard of "likely".

[28] This conclusion is fortified by the 2007 amendments to the *CRA* which addressed misconduct in the operation of motor vehicles. Different tests are used in that context, and, importantly, those amendments were not extended to apply to boats. If the general provisions of the *CRA* were intended to cover this sort of situation, then there would have been no need to amend the *CRA* to provide for forfeiture in cases of misconduct in the operation of a motor vehicle. And if the Legislature had intended to expand the scope of the *CRA* to address impaired boating, it would have done so in the 2007 amendments.

[29] 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.<sup>5</sup> 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.<sup>6</sup>

[30] Forfeiture under the *CRA* is a confiscation of private property by the state, without compensation. Where proceeds of crime are confiscated, there is no countervailing interest to balance: criminals can rightly be deprived of the fruits of their criminal activity. Where property is used for the purpose of committing criminal acts, there may be conflicting values at play. Where the property is not owned lawfully in the first place, there is a strong argument for confiscation without compensation. Where the property is owned and used legitimately by its owner, but also happens to be used in connection with a crime, the case for confiscation without compensation becomes more problematic. The Legislature recognized these issues when it used the strong language it did to define “instruments of unlawful activity” as it did: the strict interpretation of this provision is consistent with the Legislature’s goals to make this powerful remedy available to fight organized crime, drug crimes, and other similar activities.

[31] There is some risk that Mr Chygrynskyy will reoffend. But it is not “likely” that he will do so. If he does, it is not “likely” that a person will suffer serious bodily injury as a result. And this was not a close call: see *Director of Civil Forfeiture v. Robinson and Allwright*, in which the court concluded that a similar case involving drinking and driving a motor vehicle did not even raise a serious issue justifying a preservation order.<sup>7</sup>

[32] The Crown has not proved its case. The application must be dismissed. The preservation order is set aside and it is ordered that the sailboat be returned to Mr Chygrynskyy without delay.

[33] *Amicus curiae* raised an interesting issue as to whether the application of the *CRA* to a sailboat was constitutional, given the federal government’s exclusive jurisdiction over navigation

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<sup>5</sup> See *B.C. (Director of Civil Forfeiture) v. Dery*, 2013 BCSC 1643, where repeated operation of a motorcycle at high speed did not meet the test for forfeiture;

<sup>6</sup> *Kennedy v. Leeds, Grenville and Lanark District Health Unit*, (2009), 99 O.R. (3d) 215 (C.A.).

<sup>7</sup> *Director of Civil Forfeiture v. Robinson and Allright*, 2014 BCSC 2083.

and shipping.<sup>8</sup> Since it is not necessary for me to decide this constitutional issue to dispose of this case, I decline to do so.<sup>9</sup>

[34] As a side note, I have a concern about the title of proceedings. The respondent is listed as the sailboat. The sailboat is not a legal person. It has no capacity to sue or be sued. This defect is addressed by adding the words “*in rem*” after the name of the sailboat. Proceedings under the *CRA* are *in rem*. So are petitions for divorce. So are many intellectual property claims. There is nothing unusual or strange about *in rem* claims. The *in rem* nature of the rights in issue is not a basis for abandoning the basic principles of pleading: the title of proceeding should name the alleged owner(s) as respondents, or, where these persons are not known, “John and/or Jane Doe”. Alternatively, the proceeding could be styled “In the matter of Kittiwake Sailboat”.

[35] Mr Chygrynskyy was self-represented. The Crown was put to the expense of funding an *amicus curiae*, Mr Safayeni, appointed by the court, whose excellent submissions were of great assistance to the court. In the circumstances, this is not a case for costs.

[36] Counsel provided thorough and thoughtful submissions. Mr Safayeni undertook his appointment in the spirit of professionalism and provided helpful, thorough submissions on the legal issues, for all of which I am grateful.



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D.L. CORBETT J.

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<sup>8</sup> *Constitution Act, 1867*, s.91(10).

<sup>9</sup> See *Marine Services International Ltd. v. Ryan Estate*, 2013 SCC 44.