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Barristers and Solicitors

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Township of North Kawartha
280 Burleigh Street, P.O. Box 550
Apsley ON K0L 1A0

VIA EMAIL: c.parent@northkawartha.ca

Attention: Connie Parent

Dear Ms. Parent:

**RE: Short-Term Rentals - Enforcement – Digital Evidence/Electronic Records –
Anonymous Complaints
Our File No.: 3248 (General 2025)**

In recent years, municipal governments across the Province, if not Canada, have attempted to deal with short-term rentals through the strengthening of regulations.

The difficulty however is the fact that such regulations as set forth in bylaws or licensing agreements may require enforcement. The need for enforcement often follows a complaint. As enforcement often results in the use of the court system, an issue arises with respect to quality of evidence submitted in support of the complaint or the fact that the complaint itself is anonymous due to the complainant not wishing to be involved in legal proceedings. The above problems are compounded by the fact that short-term rental operators often make use of social media or websites to offer properties for lease.

Given the fact that evidence provided in support of a complaint involving an STR may be in the form of an electronic record (digital evidence), the issue for many municipalities is to understand just how such evidence will be received by the court. Closely related is the issue as to whether a municipality should act on anonymous complaints as this issue also goes to the quality of evidence needed for a successful conviction.

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Turning first to the issue of electronic documents as evidence (digital evidence), the admission of such documents are governed by Section 31.1 to 31.8 of the *Canada Evidence Act*.

As defined by the *Canada Evidence Act*, an electronic document means “data that is recorded or stored on any media in or by a computer system or other similar device and that can be read or perceived by a person or computer system or other similar device, includes the display or other output of that data”. This definition would include emails and all other electronic communications, all computer files, META data associated with the computer files, contents of websites such as Facebook, Twitter and chat logs, found on-line.

A review of the *juris prudencia* involving electronic documents would indicate that the courts have found the following records to fit within the meaning of electronic evidence:

1. Audio recordings made on a cell phone;
2. Emails;
3. Facebook messages;
4. Cell phone text messages;
5. Photographs from a phone;
6. Photographs of a chat on a phone.

When considering the admissibility of electronic documents, a court must first determine whether the record is authentic and reliable. This is referred to as the functional approach to the admission of electronic evidence. Judges are expected to engage in “rigorous...evaluation” of electronic evidence in terms of authenticity, reliability and ultimately, provable value. The fact that the records are electronic and potentially more malleable, requires that such records be considered more closely for authenticity and reliability.

The requirements for admission of electronic documents/digital evidence can be stated as follows:

1. Authenticity;
2. Reliability;
3. Relevant and Probative.

AUTHENTICITY

With respect to the requirement of authenticity, what is being referred to is whether the record is “what it purports to be”, does not mean that the document is genuine, only there is some evidence supporting what it appears to be. There is no requirement at this stage that the document be proven to be actually true or reliable.

With respect to authentication, the burden is upon the party tendering the electronic document to prove its authenticity. This is specifically set out Section 31.1 of the *Canada Evidence Act* which provides, *inter alia* “that any person seeking to admit an electronic document into evidence has the burden of proving its authenticity by evidence capable of supporting a finding that the electronic document is which it is purports to be”.

The standard under Section 31.1 has been described as simply requiring evidence capable of supporting a finding that the electronic document is as it claims (or purports to be). There must be some evidence of authenticity with the standards merely a threshold test that permits the evidence to be considered for ultimate evaluation.

Case law would suggest that the party seeking admission of any record has a burden to establish the absence of any tampering. However, it should not be taken too far when it comes to electronic records, including internet source records, since all electronic documents have the potential to be manipulated in some manner.

In considering the type of electronic record which may be received by the Township as it relates to the operation of a short-term rental, the following comments are applicable.

When proffering social media account evidence to establish identity, it is significant that there be some evidence indicating where the user logged in from, particularly where the accused might claim the postings were faked or from someone else using his or her account.

In relation to the admission of text messages, the question of who sent the text message would be an issue going to authentication and relevancy particularly where the party adducing the evidence cannot prove who sent the message and therefore unreliable. However, linking a Facebook account to an email address known to be used by an accused could be sufficient to authenticate a Facebook chat log.

With respect to web evidence, screenshots of a website are not admissible simply as being forms of photograph and must comply with the provisions of Section 31.1 to 31.8 of the *Canada Evidence Act*. However, it will usually be sufficient to have the account owner, or party to a chat log, authenticate the records as accurate. This is not always necessary and such records can be authenticated by someone other than the person taking the screenshot, as long as they have some first hand familiarity with the contents of the website.

As with a Facebook account, a website record that shows a phone number matching the phone number of the accused can be enough to satisfy the requirement of authenticity. However, absent testimony explaining the social media exhibit including what it purports to depict and what it means, may render the evidence inadmissible.

RELIABILITY

Turning to the issue of the reliability of the electronic record, this is often referred to as the “best evidence rule” which serves to assess the reliability of the contents of a record. This criteria is separate from the question of authentication which concerns the veracity or genuineness of the record’s character.

The method of proving “best evidence” or “reliability” is for someone familiar with the information to testify to its accuracy namely, the individual submitting or providing the electronic record in support of an alleged contravention of a by-law. Alternatively, someone who receives the document electronically such as the recipient of an email or text, can testify to

its accuracy and this may serve to satisfy the requirement, unless the opposing party can raise issue with respect to the accuracy of the recipient's statements. It is important to note that with respect to "reliability" the information put forward by the witness does not need to be perfect or accurate to certainty. Flawed evidence is routinely admitted during a prosecution however, the weight afforded such evidence is assessed by the trier of fact.

With respect to the issue of reliability and expected evidence as it relates to short-term rentals, screenshots are often put forward as the "best evidence" available. In doing so, screenshots of social media accounts and the integrity of such records can be supported by recording the time and date of the capture of the image as well as recording META data including URL data and underlying source code for the web page.

RELEVANT AND PROBATIVE

If the criteria of authenticity and reliability can be overcome the final criteria for a court to consider in allowing for the admission of electronic documents is the relevancy and probative value of the record. In doing so, the court will have regard to the information contained in the electronic document and whether the record has been truncated, taken out of context or the overall true character meaning of the record is hard to assess. However, assuming that the electronic record is "substantially fair and accurate", the probative value of such record will be left to the trier of fact.

With respect to short-term rentals, possible evidence visible on a social media account that may satisfy the criteria of relevancy could include:

1. Photographs on the account and its resemblance to short-term rental operation;
2. First and last names associated with the account;
3. Location of the short-term rental by way of address.

STORAGE OF RECORDS

Finally, but not part of the criteria for admission of electronic records, is the means and methods by which the electronic record has been received and stored.

It is incumbent upon a party seeking to introduce electronic records/digital evidence to confirm that the document while in receipt of the Township was retained in a secure manner which allowed for the "collection, receiving, storing, transfer, distributing, publishing or otherwise" dealing with the electronic document in accordance with the *Canada Evidence Act* and the Rules of Court. This is often referred to as the chain of possession and is important in dealing with an electronic record which as noted, is capable of manipulation.

ANONYMOUS COMPLAINTS

As a general statement, complaints regarding alleged contravention of a municipal by-law follow a set process. A complainant must submit a written complaint using the municipal complaint form. The complainant must supply their name, address and telephone number together with a clear description of the alleged complaint. Once a complaint form is properly completed it is accepted and entered into the municipality's tracking system and assigned a case number. The complainant will then be sent an email to advise them of the assigned number and to confirm that their attendance may be necessary at trial.

In the event that a municipality chooses to accept anonymous complaints, i.e. complaints without identifying the name, address and telephone number of the complainant such practice raises several concerns.

Firstly, the requirement of a municipality to act on anonymous complaints raises the concern as to the validity of the complaint being logged. The concern to the municipality is the fact that if the complaint was to be pursued based on information provided anonymously there is no ability to check the veracity of the complaint itself. This could only be accomplished by a municipal staff investigating the complaint in order to determine if the complaint is valid. In doing so this could result in an expenditure of time and resources on behalf of the Township when such a complaint is put forward for a less than legitimate reason.

This scenario is avoided by the complainant being required to identify him or herself, thereby allowing the municipality to take appropriate steps against the complainant who has chosen to file a false complaint against another party or entity.

The second concern is the fact that an anonymous complaint could not be relied upon for the purpose of swearing an information. There is no ability for by-law enforcement officer or a municipal staff member to swear an information in a formal prosecution based solely on an anonymous complaint. It is doubtful that a Justice of the Peace would allow for an information or summons to be completed based on a complaint received anonymously by the municipality without the municipality taking steps to confirm the veracity of the complaint.

In the event that the court is prepared to issue a summons based on an anonymous complaint this raises a further concern as to whether the evidence gathered was proper. An anonymous complaint would not constitute reasonable and probable grounds in the conduct of an investigation.

Further, the consequence arising from an attempted prosecution based on anonymous complaint is the fact that the municipality would not have the ability to call the anonymous complainant at trial thereby potentially compromising a successful prosecution of any alleged infraction of a municipal by-law or policy.

A more severe consequence is the possibility of the municipality being subject to a claim for malicious prosecution by relying on an anonymous complaint without any valid grounds to do so.

For those reasons set out above it is not surprising that municipalities refuse to act or respond to anonymous complaints involving short-term rentals. The only circumstances in which an anonymous complaint can be properly relied upon by a municipality is in the event of allegations of environmental or where human health, safety or security is at risk. However, even in such circumstances independent verification is required.

Finally, in preparing this letter of opinion the writer canvassed approximately 10 municipalities which have by-laws regulating short-term rentals. Not one of the canvassed municipalities has a policy by which by-law enforcement or municipal staff will respond to an anonymous complaint.

Furthermore, it is of interest, albeit not applicable to the Province of Ontario that the State of Florida recently adopted, Bill 60, which no longer allows by-law enforcement officers to investigate anonymous complaints. The only exception is if the by-law enforcement officer has reason to believe independently that the alleged violation received anonymously presents an immediate threat to public health, safety or welfare or immediate destruction of habitat. This is the current state with most municipalities in the Province of Ontario.

For the reasons set out above, it is the writer's opinion that municipal corporations should not devote time or effort in investigating or responding to anonymous complaints regarding alleged by-law contraventions including short-term rentals. In doing so there is a risk of pursuing a series of false alarms which could result in an unnecessary expenditure of municipal resources and an abuse of the complaint process.

SUMMARY

For the reasons set out above it is always prudent that a municipality collect their own evidence when considering any prosecution of an alleged contravention of a municipal by-law.

I trust the above is of assistance to you and Council in identifying concerns in dealing with evidence which may be provided to the municipality with respect to the enforcement of short-term rentals. Should you have any questions or concerns with respect to the above, please do not hesitate to contact the writer.

Very truly yours,

EWART O'DWYER

M. John Ewart.
MJE/jlh

c.c. Alana Solman – Via Email