"Searching Short-Term Rental Properties: When Will Police Require a Warrant?"

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Private short-term rental properties are an increasingly common mode of living accommodation. While the renter maintains a reasonable expectation of privacy during the rental period, circumstances arise where the property owner may also wish to assert a privacy interest in response to a state search conducted with the consent of the renter. The property owner's claim will be successful if the owner co-habits the unit. In other circumstances, the property may effectively serve an identical function as a hotel. In R v Chow, the Ontario Court of Appeal recently overturned lower court holdings finding that an owner retained a privacy interest in a short-term rental unit. Three levels of court agreed that an owner may retain a reasonable privacy interest in a property where it serves as a primary or secondary home, but they disagreed on the evidence that would be necessary to establish this interest. These courts were also reluctant to probe contractual terms to assess owner access as a factor in the privacy analysis. We argue the Court of Appeal's test for assessing whether a property served as a home is too onerous and suggest a potentially significant role for contractual terms in assessing whether an individual maintained a reasonable privacy within a short-term rental unit.

Introduction

Short-term rental companies provide a platform for individuals to rent out property in a way that can fundamentally differ from hotel stays. Whereas hotels are designed specifically for renting to third parties, the rental space utilized by alternative rental companies like Airbnb may also be used by the person renting the unit out. Put differently, a person who rents out their unit may live in it when it is not being rented, electing to stay elsewhere during the rental period.[1]

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Less commonly, the renter may live in the unit while renting out a section of the space.[2] The unit, then, may still be deeply personal to the renter while utilized as a rental space. Renters nevertheless also possess a reasonable expectation of privacy during their stay in a rental unit.[3] When their privacy interests are criminally violated by the owner—an increasingly common occurrence[4]—and police are called to investigate, the issue arises: does the owner maintain a reasonable expectation of privacy in the rental unit?

In *R v Chow*,[5] the Ontario Court of Appeal provided the first appellate ruling on whether and when an owner retains a privacy interest in a property rented for a short-term period. The court unanimously overturned the holdings at trial and at the summary conviction appeal court concluding that the accused retained a reasonable privacy interest in the apartment he rented to the complainant. But all three decisions affirmed principles relevant to assessing privacy in a short-term rental for the purposes of section 8 of the *Canadian Charter of Rights and Freedoms*.[6] Among them was the view that a claimant may establish a reasonable expectation of privacy in a space she rents where the space remains her primary or secondary home. She may establish this by showing that she used the space as a residence in a meaningful way. Some indicia for so proving includes furnishing the property with personal effects, residing in it on occasion, and retaining permission to access it during the rental period.

The crux of the dispute between the Court of Appeal and lower courts was over the evidence necessary to meet the test of whether a space served as a person's primary or secondary home during the rental period, and when the court can infer an owner retains access. We argue that the Court of Appeal placed too high a bar on establishing that a rented space serves as a

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[1] These types of units constituted approximately 70 percent of the rentals in Canada as of 2017. See Hotel Association of Canada, "Developing a Modern Approach to Short-Term Rentals in a Digital Economy: A Framework for Canadian Regulators" (July 2018), online: <http://www.hotelassociation.ca/wp-content/uploads/2018/08/HAC-STR-Framework-Paper-FINAL-.pdf> at 4.

[2] *Ibid*.

[3] See e.g., *R v Wong*, [1990] 3 SCR 36 (finding that the accused maintained a reasonable expectation of privacy while renting a hotel over a short period). For authority affirming that the rationale in *Wong* applies to short-term rental units, see *R v Young*, 2019 ONSC 3563 at paras 69-70

[4] See e.g., Tracy Moore, "Some Airbnb Hosts are Secretly Recording Their Guests. Is it Illegal?" *MelMagazine* (6 December 2017), online: <https://melmagazine.com/en-us/story/some-airbnb-hosts-are-secretly-recording-their-guests-is-it-legal>.

[5] 2022 ONCA 555.

[6] Being schedule B to the *Canada Act 1982* (UK), 1982, c11 [*Charter*].

person's home. We also argue that the court's analysis of the question of access was inadequate. Courts should take a closer look at the contractual terms of an agreement, express or implied, in a given situation to decide whether an owner retained a right of access. We suggest an alternative test for weighing these factors that would provide police and courts clearer and more effective guidance in applying section 8 of the *Charter* in the context of short-term rentals.

The article unfolds in three parts. We begin in Part I by detailing the relevant legal principles and jurisprudence governing whether an accused maintains a reasonable expectation of privacy in an item or place searched by the police. In Part II, we then provide an overview of the unique factual context of the *Chow* case and highlight salient differences in approach among the different levels of court. We conclude in Part III by considering the broader context of short-term rental property searches to craft a principled approach for determining when police should be required to obtain a warrant.

I. Reasonable Expectations of Privacy

Section 8 of the *Charter* provides that "[e]veryone has the right to be secure against unreasonable search or seizure." To qualify as a "search" or "seizure," the accused must possess a reasonable expectation of privacy in the thing or place that is the object of state investigation.[7] If the accused maintains a reasonable expectation of privacy, any state search will be presumptively unreasonable.[8] To avoid breaching section 8 of the *Charter*, the state must establish on a balance of probabilities that the search was authorized by law, the authorizing law is reasonable, and the search was conducted in a reasonable manner.[9]

Four lines of inquiry are relevant to determining the threshold question of whether an accused possesses a reasonable expectation of privacy.[10] First, the court must determine the subject matter of the search. Courts must not do so "narrowly in terms of the physical acts involved or the physical space invaded, but rather by reference to the nature of the privacy interests potentially compromised by the state action."[11] Moreover, courts should take "a broad

[7] See e.g., *R v Tessling*, 2004 SCC 67 at para 18; *R v Spencer*, 2014 SCC 43 at para 16; *R v Marakah*, 2017 SCC 59 at para 10.

[8] See *Hunter v Southam Inc*., [1984] 2 SCR 145 at 161.

[9] See *R v Collins*, [1987] 1 SCR 265 at 278.

[10] See e.g., *Marakah*, *supra* note 8 at para 11.

[11] See *Spencer*, *supra* note 8 at para 26 citing *R v Ward*, 2012 ONCA 660 at para 65.

and functional approach to the question, examining the connection between the police investigative technique and the privacy interest at stake."[12] In so doing, courts must assess "not only the nature of the precise information sought, but also… the information that it reveals."[13] The fact that illegal information might be revealed is irrelevant to defining the subject matter of the search.[14]

The second line of inquiry considers whether the accused maintained a direct interest in the subject matter.[15] Typically, the accused will maintain such an interest as they either own the property or the state act constitutes a search of their person.[16] This does not, however, mean that a lack of proprietary or possessory interest will always be determinative of whether the accused maintained an interest in the subject matter. In *R v Spencer*,[17] for instance, the accused maintained an interest in internet subscriber information utilized by his household despite not contributing to the costs of the internet connection.[18] The fact that an accused possesses no interest in the subject matter will nevertheless prevent a claim from succeeding in circumstances where the accused appears to rely solely on the breach of another person's privacy interests.[19]

Third, the claimant must subjectively believe they have an expectation of privacy in the subject matter.[20] This requirement has been described as not "a high hurdle" and may be inferred from the circumstances of the case.[21] Even where the accused did not subjectively believe that they possessed a reasonable expectation of privacy, courts will be reluctant to strike their claim on this basis alone. As the Supreme Court confirmed in *R v Tessling*,[22] an absence of a subjective

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[12] See *Spencer*, *supra* note 8 at para 26.

[13] *Ibid*.

[14] *Ibid* at para 36. See also *R v Patrick*, 2009 SCC 17 at para 32.

[15] See *Marakah*, *supra* note 8 at para 11.

[16] See e.g., *R v Kokesch*, [1990] 3 SCR 3 (searching the perimeter of an accused's house); *R v Belnavis*, [1997] 3 SCR 341 (searching a person's vehicle); and *R v Golden*, 2001 SCC 83 (strip searching an accused's person).

[17] *Supra* note 8.

[18] *Ibid* at para 51.

[19] See e.g., *R v Edwards*, [1996] 1 SCR 128 (the accused was prevented from pleading a breach of section 8 of the *Charter* when police illegally searched his girlfriend's home (paras 7-8). The fact that the accused was "just a visitor" in the house, did not contribute to rent or household expenses, and maintained no authority to regulate access to the premises was sufficient to negate any expectation of privacy in the unit (paras 47-49).

[20] See *Marakah*, *supra* note 8 at para 11.

[21] See e.g., *Patrick*, *supra* note 15 at para 37.

[22] *Supra* note 8.

expectation of privacy "should not be used too quickly to undermine the protection afforded by s. 8 to the values of a free and democratic society."[23]

Finally, courts must determine whether the accused's subjective expectation of privacy is objectively reasonable.[24] This involves a normative question.[25] The courts are concerned here with whether members of a "free and democratic society" would enjoy privacy from the state in the use or possession of the space or item at issue in a generic sense—i.e., privacy not in a particular hotel room, for example, but in a hotel room *per se*.[26] The factors considered in this analysis will turn on the category or type of privacy claim being pleaded.[27] Two categories are particularly relevant for present purposes: territorial and informational privacy. Territorial privacy implicates state sanctioned invasions of personal property.[28] Informational privacy aims to "protect a biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination to the state" and includes any "information which tends to reveal intimate details of the lifestyle and personal choices of the individual."[29]

As we explain below, a variety of Supreme Court cases applying this framework provide a basis for concluding that the owner of a short-term rental unit may maintain a reasonable expectation of privacy in the property while it is rented out. In essence, the jurisprudence demonstrates that third-party consent to permit a search need not negate the owner's privacy interest in the place or thing being searched. However, there are important differences between these cases and the scenario where a renter discloses incriminating information to police while staying in a short-term rental unit. While consideration of this question is sparse, the Ontario Court of Appeal's decision in *Chow* provides a useful launching pad for discussion.

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[23] *Ibid* at para 42.

[24] See *Marakah*, *supra* note 8 at para 11.

[25] See *Tessling*, *supra* note 8, at para 42, noting that "[e]xpectation of privacy is a normative rather than a descriptive standard."

[26] See *Wong*, *supra* note 3 at 44-45.

[27] See e.g., *R v Cole*, 2012 SCC 53 at para 45.

[28] See e.g., *R v Plant*, [1993] 3 SCR 281 (police touched the perimeter of a house) and *Tessling*, *supra* note 8 (use of FLIR imaging).

[29] See *Plant*, *supra* note 29 at 293. See also *Tessling*, *supra* note 8 at para 25.

II. The Decision in *Chow*

The accused had purchased and obtained possession of an apartment in July of 2018. He rented out the apartment for a 10-day period in September of that year using the online platform Airbnb.[30] During the first night of his stay, the renter noticed a bright light coming from a digital alarm clock in one of the bedrooms directly facing a bed inside the room. To prevent the light from disrupting his sleep, he placed a bag in front of the alarm clock. The next day, he discovered that the bag was moved while he was out of the unit. The renter subsequently received a message from the accused noting that he had entered the unit to leave some coupons for the renter.[31] Upon more closely inspecting the alarm clock, the renter observed what he believed to be a covertly installed camera located inside. He then contacted Airbnb, who told him to check into a hotel and notify the police of the camera.[32]

Upon arrival, the police obtained the renter's consent to enter the apartment and locate the alarm clock. The investigating officer seized the clock and brought it back to the police station. The next day, the officer inspected the clock without a warrant and found an SD memory card hidden therein. The officer then applied for a warrant to view its contents.[33] The search revealed hundreds of short videos,[34] several of which featured the accused leisurely occupying the premises. More importantly, the police discovered two videos of a stranger in the nude masturbating.[35] The accused was accordingly charged with voyeurism contrary to section 162 of the *Criminal Code of Canada*.[36] At trial, he sought to exclude the camera evidence for having been obtained in breach of section 8 of the *Charter*.[37]

The trial judge found that the accused had retained a reasonable expectation of privacy in the apartment during the period of the rental, and that their warrantless entry and search of the unit and seizure of the clock violated his rights under section 8 of the *Charter*. Assessing the

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[30] See *Chow ONCA*, *supra* note 5 at Appendix A, paras 1-4.

[31] *Ibid* at Appendix A, paras 5-6.

[32] *Ibid* at Appendix A, paras 7-9.

[33] *Ibid* at Appendix A, paras 12-15. He also obtained a warrant to search the accused's primary residence but retrieved nothing during that search.

[34] *Ibid* at Appendix A, paras 17-88.

[35] *Ibid* at Appendix A, paras 76-79, 85.

[36] RSC 1985, c C-46 [*Criminal Code*].

[37] See *Chow ONCA*, *supra* note 5 at para 12.

privacy interest, Justice Bovard held the subject matter of the search to be both the apartment and the clock camera.[38] He characterized the accused's interest in the property as strong on the basis of his ownership of it and control over its contents.[39]

The Crown retorted that the accused was not an occupant of the apartment but simply an owner, suggesting the unit was merely a rental property and not a home or residence to the accused. Justice Bovard disagreed. The clock camera captured the accused visiting the apartment on four occasions, from soon after he purchased it to early August. It did not record him having meals in the apartment, but it did capture him staying overnight on two occasions. His possessions had also "filled the apartment", suggesting that "[t]his characteristic of 'occupancy' was not erased when he rented the apartment" to the complainant.[40] Considering the factors in *R v Edwards*,[41] Justice Bovard found that, in the totality of the circumstances, the accused had a subjective expectation of privacy in the space, but "to a lesser degree than if it were his full-time home"—implying that the apartment could be characterized as *one* of the accused's *homes* rather than a space meant only to be rented out.[42] The accused had a subject expectation of privacy in the clock camera and its contents on the basis that what it captured—the accused doing things in his underwear—were expected to be private.[43]

The trial judge also found the accused's privacy expectations in relation to the apartment and clock camera to be objectively reasonable for several reasons. The accused "owned the apartment, exercised what appears to be sole control over it, used it on several occasions within the three weeks since he bought it, and was able to regulate access to the apartment, including the right to grant access to it."[44] More crucially, Justice Bovard found the privacy interest in the apartment to be reasonable "because to a significant, albeit limited extent it functioned as a home for him."[45] He likened the situation to a case where "one may have a pied-à-terre where one stays

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[38] See *R v Chow*, 2020 ONCJ 57 at paras 50-52 [*Chow ONCJ*].

[39] *Ibid* at para 53-54.

[40] *Ibid* at para 61.

[41] *Supra* note 20.

[42] *Chow ONCJ*, *supra* note 39 at para 62.

[43] *Ibid* at para 63.

[44] *Ibid* at para 66. A similar rationale followed for the alarm clock. See paras 71-72.

[45] *Ibid* at para 67.

occasionally."[46] Expanding on this observation, he wrote: "I think that whether a location is a 'home' depends more on whether one uses it as one would use a home. Examples of factors that can inform this criterion are the contents of the place, and that one stays there at times."[47] The same logic extended to the contents of the apartment, including the clock camera. Having ownership and control of these items mattered more to the privacy analysis than how often he may have made use of them.[48]

Despite finding that the accused had an objectively reasonable expectation of privacy in the apartment and the clock—suggesting that the question of whether section 8 was engaged had been settled—Justice Bovard proceeded to assess the impact of the rental unit on the accused's privacy expectation. He found no evidence that the accused had granted the renter exclusive use and possession of the unit.[49] He also found it significant that the accused entered the apartment to leave coupons for the renter and, in leaving a note about this, did not seek to hide the fact that he entered.[50] The renter's right to occupy the space may have permitted him to invite police to enter, but Justice Bovard concluded that to "allow them to search the apartment without a warrant and seize property encroached on Mr. Chow's reasonable expectation of privacy."[51] The court relied on *R v Cole*[52] for the proposition that the renter's consent to police entry could not function to waive the accused's rights under section 8.[53]

The summary conviction appeal judge affirmed the trial court's application of section 8 of the *Charter*, offering a similar analysis of the accused's privacy interest.[54] The accused and the renter possessed "overlapping interests in the premises", with "neither party's rights 'extinguished' during the relevant period of time",[55] though the accused's expectation of privacy

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[46] *Ibid* at para 68.

[47] *Ibid* at para 69.

[48] *Ibid* at para 71.

[49] *Ibid* at para 88. To the contrary, see our analysis in Part III(b) below.

[50] *Ibid* at para 77.

[51] *Ibid* at para 97.

[52] *Supra* note 28.

[53] *Ibid* at para 104, noting the Crown conceded this point.

[54] As the summary conviction appeal judgment was not reported, we rely on the Ontario Court of Appeal's summary of the judgment in *Chow ONCA*, *supra* note 5 at paras 17-20.

[55] *Ibid* at para 17.

was diminished in light of the renter's corresponding privacy interest. Several factors mitigated in favour of the accused retaining a reasonable privacy interest, including his ownership of the apartment, the property he kept within it, and his ability to enter the unit freely.[56] As a result, while the renter possessed a right to admit police into the apartment, he could not consent to police searching the premises or its contents. The warrantless search of the apartment and the clock camera were therefore presumptively unreasonable.[57]

Overturning the lower court holdings, Justice Huscroft, in a unanimous decision of the Ontario Court of Appeal, emphasized that the reasonable expectation of privacy inquiry is normative, but also turns on "the unique circumstances of each particular case."[58] The question here was not whether the accused had a reasonable privacy interest in the apartment "in general or in all circumstances", but whether he had one "*when the apartment was rented to the complainant*."[59] The crux of the analysis turned on whether the apartment functioned as a second home the accused had temporarily rented out, or whether it was better characterized as a rental property in which the accused had no meaningful personal interest aside from income. The court took the latter view, holding that it would have been implausible for the accused to expect privacy in the space during the relevant period.

In support of this view, Justice Huscroft noted that the accused stayed overnight at the apartment and furnished the space with certain items, but he quibbled with whether to infer from these facts that the apartment served as the accused's second home. Chow may have stayed overnight twice, but it was unclear whether he had a meal in the apartment. The apartment was only "sparsely furnished", "with no personal effects."[60] Photographs further showed "no books, no items on the table, and an empty closet".[61] More broadly, there was "no evidence that [the accused] kept meaningful personal items at the apartment, or any items that tended to reveal any intimate details of his lifestyle or personal choices, and no evidence that he kept any part of the

[56] *Ibid*.

[57] *Ibid* at para 18.

[58] *Ibid* at para 21.

[59] *Ibid* at para 22 (emphasis in original).

[60] *Ibid* at para 30.

[61] *Ibid.*

apartment private from the complainant."[62] Had Chow testified on the *voir dire* into the validity of the search, he might have made a stronger case for having a subjective expectation of privacy by providing further indicia to support the claim that the apartment functioned as a second home he rented temporarily. But in the absence of such evidence, the Court of Appeal viewed the factual record as more consistent with the property being used as a rental property.

Justice Huscroft was not moved from this view by the fact that the accused owned the property and was able to access it with a spare key. As he observed, "[i]t goes without saying that anyone who temporarily gives up possession of their property, whether for a short or long-term period, will keep a key." It follows that "[k]eys are an incident of ownership, but control over the apartment need not be inferred from possession of them."[63] To establish control, Justice Huscroft demanded evidence that the accused was authorized to enter the premises during the rental period.[64] In his view, the accused's "unilateral action in entering the apartment without notice to the complainant and without his consent cannot support a claim that he had an objectively reasonable expectation of privacy in the apartment at the relevant time."[65] Where such permission exists—or, as is common, the accused also lives in the property during the renter's stay—a reasonable expectation of privacy may be preserved.[66]

At the conclusion of his discussion, Justice Huscroft also considered the normative implications of the holding in this case for complainants in short-term rentals. In light of the fact that the accused had no persisting privacy interest in a rental property, it would not have been reasonable to object to police entry in the circumstances. As Justice Huscroft held, "[a] reasonable person in the [accused's] place would expect that the complainant was entitled to call the police if he thought a crime had been committed against him at the apartment and would expect the complainant to invite the police into the apartment to investigate."[67] Presumably, Justice Huscroft was concerned about the renter's ability to preserve their use of the property in a manner that is secure against criminal conduct on behalf of the party renting them the property.

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[62] *Ibid* at para 32.

[63] *Ibid* at para 36.

[64] *Ibid.*

[65] *Ibid*.

[66] *Ibid* at para 37.

[67] *Ibid* at para 41.

Given the above analysis, Justice Huscroft concluded that police could rely on the renter's consent to enter, and once inside, they were authorized by the plain view seizure power in the *Criminal Code* to seize the clock.[68] Information available to police at the time of the search strongly suggested they possessed the required grounds to conduct the latter search. The clock-camera was unplugged, but blue LED lights were flashing from the screen.[69] The device also contained a slot for a memory card.[70] The police were further able to locate an online ad for an identical device "containing a WIFI-enabled night vision camcorder with infra-red lights."[71] Finally, the complainant reported that a bag placed in front of the camera was moved after the accused entered the apartment while the complainant was away from the unit.[72] Given the unique facts in *Chow*, Justice Huscroft concluded that the police possessed ample grounds to seize the clock-camera and its corresponding memory card.[73]

III. A Principled (and Non-Litigious) Approach

Justice Huscroft's decision in *Chow* provides a number of starting points for considering whether a property owner maintains a reasonable expectation of privacy in a short-term rental unit. As the nature of the property within the unit provides an indeterminate framework for analysis, courts should primarily seek to reconcile the privacy interests possessed by the owner of a home with the fact that the owner may be contractually prohibited from entering the unit during a rental. The novelty of combining these competing interests renders it difficult to draw any definitive conclusions about whether the owner maintains a reasonable expectation of privacy in their home. As we explain below, courts will have to choose whether contractual terms barring an owner from entering a home is sufficient to negate an otherwise reasonable expectation of privacy.

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[68] *Criminal Code*, *supra* note 37, s 489(2) (authorizing police to seize items found when lawfully within a place, where they have a reasonable belief the items will afford evidence of an offence).

[69] See *Chow ONCA*, *supra* note 5 at para 48.

[70] *Ibid*.

[71] *Ibid*.

[72] *Ibid*.

[73] *Ibid*.

(a) What Makes a Place a Home

Justice Huscroft expressed in *obiter* in *Chow* a view consistent with the lower court holdings that a claimant may establish that a space serves as a primary or second home where it is "shared" or "where the property rented is a home that includes personal effects".[74] In these cases, "an accused's dignity, integrity, and autonomy interests may be more readily apparent." The test, then, is whether, in a given case, these interests *are* readily apparent. Justice Huscroft's analysis in *Chow* suggests that this would be so where a person occupies a property in a meaningful way. Indicia of this would include furnishing a property with personal effects, eating and sleeping there, or perhaps just visiting occasionally, but spending time there in a manner that implies the space serves as a place to be free and secluded. The difference of opinion between the Court of Appeal and lower courts was over what evidence is necessary to establish *whether* a place serves as a home. We suggest the Court of Appeal placed the bar too high.

For Justice Bovard, assessing the question at trial, the apartment served as Chow's home despite his not having visited the place often, it not being clear whether he had had a meal there, and it not being furnished with highly personal effects. It was a home to Chow—something akin to "a pied-à-terre where one stays occasionally"[75]—because it was a place he had used *as a residence*. This could be inferred from the fact that (a) he had furnished it with trappings of a residence (rather than say an office); and (b) he used it in a manner consistent with the perception of it as a residence (i.e., inhabiting it in his underwear; staying overnight twice).

Justice Huscroft was more critical. The lack of clearly personal effects in the apartment was significant ("no books, no items on the table, and an empty closet"), suggesting that although Chow might have furnished the space to be a residence and stayed there twice, it was not clear that Chow viewed the space as *his* residence. For the Court of Appeal, one must present evidence of a clearer personal imprint on a space in order to establish a claim that a rental space functions as a primary or secondary home. Evidence of a space being furnished to serve as a home and evidence of a claimant's use of it as such will not suffice.

In our view, this places the bar too high because it invites the court to engage in disputes over how much of a personal touch one must establish in a space to make out a claim that a space

[74] *Ibid* at para 37.

[75] See *Chow ONCJ*, *supra* note 39 at para 68.

is an accused's home—with outcomes that are impossible to predict. Or it invites difficult to settle disputes over whether one had stayed in a place often enough or used the space in a way that seems sufficiently "home" like. In addition, the approach offered in *Chow* raises evidentiary questions. The Supreme Court has long held that any privacy interests within an object must be assessed neutrally before a search or seizure is conducted.[76] How, then, are police to obtain this information before they conduct a search of a short-term rental unit? Notably, the property within such a unit cannot be ascertained until the police enter the premises. Absent other evidence demonstrating that a unit is utilized solely for commercial purposes, courts should therefore presume that such a search attracts a significant degree of privacy.[77]

Upon receiving a report of a potential offence by a landlord against a renter, we therefore think police should be required to obtain a warrant where they know (a) the place at issue is a residential space (rather than a commercial one) and (b) it is a short-term rental. These facts alone give the police no more or less information about the *nature* of a property than they would possess when responding to a report about a grow-op or other offence at a residential address. In either case, they know the property at issue is a private home. And if it is rented to the person making the report, police know they do not have the owner's (or co-occupant's) permission to enter. Just as they would seek a warrant to enter a home rented to tenants suspected of running a grow-op upon a report by a landlord (or *vice versa*), police would know they need to obtain a warrant when a renter reports on an owner. A court on review of a search could then consider whether the owner did, in fact, have a reasonable privacy interest in the space at the relevant time—as is the case in countless drug prosecutions.

A court in this context should ask whether there is evidence that, during the period of the rental, the property served a solely commercial purpose as a short-term rental unit. If not, this would address whether the claimant retained a subjective expectation of privacy and whether it was objectively reasonable. If the Crown establishes as much, the accused should then be required to provide evidence that the she furnished the space to function as a residence and whether used it in a manner consistent with the perception of it as a residence. Evidence of this could include having spent time in the space to do anything not strictly associated with

[76] See *Hunter*, *supra* note 9 at 160.

[77] See e.g., *R v Stairs*, 2022 SCC 11 at para 49 citing *Eccles v Bourque*, [1975] 2 SCR 739 at 742-43; *R v Silveira*, [1995] 2 SCR 297 at para 140; *Tessling*, *supra* note 8 at para 22; *Semayne's Case* (1604), 77 ER 194 at 195.

maintaining it as a rental property and possibly retaining a right of access during the rental period. This test would avoid the problem of courts wandering into murky terrain around questions of how personal the décor happens to be or how many meals one had in the space. It would also be consistent with a general societal understanding of the nature of an Airbnb rental: *i.e.*, that it facilitates a stay not in a hotel but in a home—a home belonging to *someone* in particular.

(b) Ownership and Access

Justice Huscroft also considered the accused's ownership and ability to access the rental unit as indicia of whether the space served as a second home. This in turn served to indicate whether the accused had a subjective and an objectively reasonable privacy interest in the space during the period of the rental. Mere ownership without access is more consistent, in the court's view, with the use of a property primarily as a rental unit and thus mitigates against finding a reasonable privacy interest in the space. In this case, the Court of Appeal disagreed with the findings of the courts below that Chow had retained access, since the right had not been clearly agreed upon by the parties. Yet, Justice Huscroft declined to probe the terms of the contract—express or implied—in assessing the question of access. In the context of short-term rentals, courts should endeavour to do so.

Whether an owner maintains the *ability* to enter a unit with a separate key is, as the court notes in *Chow*, irrelevant.[78] This is consistent with the Supreme Court of Canada's jurisprudence on point.[79] As with other landlords, property owners need to establish some authority for entering a rental unit. While tenancy law typically provides landlords limited authority to enter, these laws do not apply to short-term rental units.[80] Nor is it clear that governments are interested in regulating the short-term rental market in such a manner. As the Hotel Association of Canada

[78] See *Chow ONCA*, *supra* note 5 at para 36.

[79] See e.g., *R v Buhay*, 2003 SCC 30 at para 23. While the owners of the locker possessed a master key, the Court did not attach much weight to this fact. As it observed, if the opposite were true "there would be no expectation of privacy in an apartment building, office complex or university residence, for instance. Unless an emergency or other exigent circumstance arose, locker renters may reasonably expect that their lockers are free from unauthorized search by bus terminal security agents or by the police."

[80] See e.g., *Residential Tenancies Act*, SO 2006, c 17, ss 5, 26-27; *Residential Tenancy Act*, SBC 2002, c 78, ss 4 29 [*RTABC*].

observes, "[n]o province has… regulate[d] short-term rentals in the areas of health and safety, landlord and tenant relations, and commercial contracting."[81]

However, a court may in some cases find that a contract between a renter and a property owner—as facilitated by a short-term rental platform—provides a basis for an owner to enter the premises at will.[82] For instance, Airbnb outlines "terms of service" that are binding between the host and the renter.[83] These conditions state that "[t]he Host retains the right to re-enter the Accommodation during your stay, to the extent: (i) it is reasonably necessary, (ii) permitted by your contract with the Host, and (iii) consistent with applicable law."[84] The conjunction "and" suggests that only an additional contract—permitting entrance upon reasonable conditions and in a manner that is consistent with applicable law—will permit the host to enter the rental unit during the duration of the renter's stay.[85] As no law known to us precludes such contracts in Canada, any contract entered into between the property owner and renter should impact whether the owner maintains a reasonable expectation of privacy in the unit.

The appropriate weight to be given to contractual agreements within the reasonable expectation of privacy analysis nevertheless remains unclear. As the Supreme Court observes in *Spencer*, "[t]here is no doubt that the contractual… framework may be relevant to, but not necessarily determinative of, whether there is a reasonable expectation of privacy."[86] The Court's clarification that typical "contracts of adhesion" should be given limited weight is prudent.[87] These contracts are usually drafted by corporate entities and consumers may have little realistic control over whether to agree with their terms.[88] The contracts are also often highly complex. As

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[81] See Hotel Association of Canada, *supra* note 1 at 12. To our knowledge this remains true today. While the Association demonstrates that governments are interested in taxation, it is not clear that legislation will soon arrive to regulate landlord and tenant relations in particular.

[82] For authority that contracts between private parties can impact the reasonable expectation of privacy analysis, see *Spencer*, *supra* note 8 at para 54.

[83] See Airbnb, "Terms of Service" online: <https://www.airbnb.ca/help/article/2908?locale=en&_set_bev_on_new_domain=1672501251_OTJkYTJhNjg5YzBh>, preface.

[84] *Ibid*, s 2.3.

[85] The Airbnb website is explicit that such contracts must be entered into separately by the owner and renter.

[86] See *Spencer*, *supra* note 8 at para 54.

[87] *Ibid*.

[88] *Ibid*. See also *R v Gomboc*, 2010 SCC 55 at paras 31-33.

the Court explained in *R v Gomboc*,[89] "existence of an obscure regulation that the reasonable person is unlikely to understand does nothing to render [an accused's] subjective expectation objectively unreasonable."[90] In such circumstances, it is reasonable to place little, if any, weight on a contractual agreement when determining a reasonable expectation of privacy.

But in other circumstances, the unique contractual relationship between parties to a short-term rental can and should play a more important role in the privacy analysis. Unlike a consumer signing a contract of adhesion, the accused will often be a non-corporate property owner offering a service.[91] Many of the property owners renting out units are therefore unlikely to stand in a significant position of power vis-à-vis prospective renters.[92] Nor are those conditions in any way imposed upon the renter as the terms are written by an independent third party—short-term rental companies—with an interest in facilitating agreements between renters and owners. Indeed, the owner is explicitly told on the Airbnb platform that they may draft a separate contract to ensure their right of access is unimpeded during the rental period. For these reasons, the contractual arrangement should play a much greater role in determining whether the accused maintains a reasonable expectation of privacy.

The challenge for courts moving forward is to determine if the failure to contract an ability to enter a unit owned by the accused should negate what is otherwise typically a reasonable expectation of privacy. This is a novel question, and one we admit some hesitancy answering in the affirmative. The high privacy interests one maintains in a home—even in a secondary home—should not be dismissed lightly. Given the Supreme Court's prior holding that

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[89] See *Gomboc*, *supra* note 101.

[90] *Ibid* at para 142 (dissenting reasons of Chief Justice McLachlin and Justice Fish) cited approvingly in *Spencer*, *supra* note 8 at para 54.

[91] See e.g., *Gomboc*, *supra* note 101 (utility provider). While Airbnb is a corporation, it is a platform for users to engage in negotiations and does not directly negotiate rental agreements. See Airbnb, "Terms of Service", *supra* note 96.

[92] While data in Canada is sparse, see Zach Dubinsky and Valérie Ouellet, "Who's Behind the Smiling Faces of Some Airbnb Hosts? Multimillion Dollar Corporations" *CBC News* (30 April 2019), online: <https://www.cbc.ca/news/business/biggest-airbnb-hosts-canada-corporations-1.5116103>. The authors conducted a "national analysis [which] found 44 per cent of hosts had at least two listings, and 22 per cent had at least five." The latter statistic suggests that many Airbnb rentals are managed by various sizes of corporate entities that may possess more bargaining power than hosts with fewer properties. It is nevertheless unlikely that these corporate hosts having anything close to bargaining power that renders any agreement a contract of adhesion. See also Sidhartha Banerjee, "Majority of Airbnb Revenue in Canada Comes from 10 per cent of Hosts: Study" *Globe and Mail* (8 August 2017), online: <https://www.theglobeandmail.com/real-estate/the-market/study-finds-10-per-cent-of-airbnb-hosts-account-for-majority-of-revenues/article35904856/>;

contractual obligations can be highly impactful if not determinative of the privacy analysis, this question of law will benefit from further judicial reflection and clarification about the extent of the role of contracts in negating what is otherwise a reasonable expectation of privacy.

Conclusion

The short-term rental context will require courts to weigh a set of novel conditions to decide whether an owner maintains a reasonable expectation of privacy in a rental unit. While an owner who co-habits with a renter will clearly maintain such an interest, in other cases, it may be less clear. Three levels of court in *Chow* agreed that the question of privacy on the part of an owner turns on whether a property functions at the relevant time as his or her primary or secondary home. This depends on establishing a use or enjoyment of it as a home in some meaningful sense. We have argued that courts and police would benefit from a clearer and less onerous test for when a place amounts to a home, one that asks only whether it was furnished to serve as a home and used to some degree in that manner. We have also suggested that courts should consider specific contractual arrangements in assessing whether an owner maintains a reasonable expectation of privacy in a short-term rental unit. We remain, however, hesitant to conclude that these contracts should negate the owner's typically reasonable expectation of privacy.