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SOCIAL MEDIA AND EMPLOYER RIGHTS

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The purpose of this presentation is to provide an overview of this area of the law. This does not by any means constitute a full analysis of the law or an opinion of Roper Greyell LLP or any member of the firm on the points of law discussed.
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Expectation of Privacy

- Social media plays an increasingly important role in workplace
- Employer must be conscious of privacy rights
- Recent Ontario Court of Appeal decision: *R v Marakah*, 2016 ONCA 542

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Expectation of Privacy

- Police seized cell phones under search warrant
- Text messages implicated Marakah and co-accused in gun trafficking
- Search of Marakah's cell phone violated his *Charter* rights

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Expectation of Privacy

- But *Charter* rights did not extend to text messages sent by Marakah to the co-accused
- Sender of text message has no expectation of privacy in hands of recipient
- Appeal to SCC to be heard Spring 2017

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Expectation of Privacy

- Different result in *R v Pelucco* 2015 BCCA 370
- BCCA held that accused does have expectation of privacy over sent text messages
- Reasonable expectation that message will remain private in hands of recipient

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Expectation of Privacy

- *Marakah* may also be contrary to *R v Cole*, 2012 SCC 53
- SCC determined employees have reasonable expectation of privacy over content of work computers
- Nude photos of student on teacher's work laptop

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Expectation of Privacy

- Cole's employer turned laptop over to police
- Police conducted warrantless search
- *Charter* right to privacy violated
- Personal information on computer touched on user's "biographical core"

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Expectation of Privacy

- SCC found reasonable expectation of privacy despite clear employer policies
- Arbitrators and civil courts may be guided by *Charter* cases from criminal context

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SGEU and Unifor, Local 481 (2015), 255 LAC (4th) 353 (Ponak)

- Objection as to admissibility of emails
- Grievor was labour relations officer of SGEU
- Many SGEU members worked in correctional services
- Grievor banned from correctional facilities due to police investigation

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SGEU and Unifor, Local 481

- Terminated for violating IT policy and code of conduct
- Emails between grievor and his wife sent on office computer not admissible
- Reasonable expectation of privacy despite language in IT policy

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SGEU and Unifor, Local 481

- IT policy stated that emails from office computer not considered private
- Policy stated employer retained right to access contents of emails sent through office system
- IT policy reduced but did not extinguish expectation of privacy

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SGEU and Unifor, Local 481

- Heightened expectation of privacy over emails between spouses
- Intrusion of privacy not justified on facts
- Search of private emails was employer's first step
- Less intrusive methods available

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Social Media Policies

- Clear and consistently enforced policy may dispel at least some of the expectation of privacy
- A lack of a clear policy was found to be significant in *Kim v International Triathlon Union*

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Kim v International Triathlon Union, 2014 BCSC 2151

- Plaintiff was Senior Manager of Communications
- Considered the “voice” of the employer
- Dismissed for personal Twitter and blog postings about her manager
- Employer argued plaintiff was professional who should know better

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Kim v International Triathlon Union

- No previous discipline or warning about social media activity
- No policy concerning social media
- No discussions about social media
- Employer did not have cause to terminate
- Service less than 2 years, awarded 5 months in lieu of notice

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Computer Monitoring

- Employers may have legitimate business interest in monitoring use of computers at work
- Employee privacy rights must also be considered

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District of Saanich, 2015 BCIPCD 15

- Privacy Commissioner Investigation report
- Monitoring software installed at District of Saanich
- Software monitored keystrokes and login activity, email and user logon

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District of Saanich

- Collection of the following personal information violated FIPPA:
 - program activity
 - email
 - user logon information
 - keystroke logs
 - screenshots

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District of Saanich

- Employer was authorized to collect:
 - Logs of websites visited
 - Data transferred
 - Files created, deleted, renamed or copied
 - Network activity
- Pithy Quote:

“... employees do not check their privacy rights at the office door...right to privacy in the workplace ... must be respected ...”

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Off-duty Use of Social Media

- Where social media posts are sufficiently harmful to the employer’s business interests they will be cause for discipline
- Analysis will be similar to other off-duty conduct

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Toronto and TPFPA, 2014 OLAA 507 (Newman)

- Firefighter dismissed for off-duty Tweets
- Comments were “sexist, misogynist and racist”
- Claimed he did not know Twitter was public
- Grievance dismissed

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Toronto and TPFFA

- Conduct harmed reputation of employer
- Conduct violated workplace policies including human rights policy
- Belief that Tweets private not credible
- Reckless use of Twitter account
- Dishonest about other Tweets

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**Canada Post Corp. and CUPW,
[2012] C.L.A.D. No. 85 (Ponak)**

- Postal clerk 31 yrs service discharged for Facebook postings
- Derogatory and demeaning statements about supervisors and employer
- Grievance dismissed

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Canada Post and CUPW

- Facebook postings were abusive, intimidating and mocking
- Posts were viewed by other employees
- Managers required time off work for emotional distress and medical care

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Canada Post and CUPW

- Fact that grievor believed her postings were private did not relieve her of responsibility for posts
- Arbitrator rejected claim of mental illness and drunkenness
- Provocation defence failed
- Response was disproportionate to events complained of

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Maxam Bulk Services and IUOE 115, [2015] BCCAAA 72 (McConchie)

- Negative Facebook posts about employer's largest client
- Posts also slandered supervisor
- Grievance allowed in part
- No evidence of harm to relationship with employer's client
- No clear policy regarding social media

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Maxam Bulk Services and IUOE

- Grievor motivated by defence of his own employer
- Grievor was good worker with 4 ½ years service
- Grievor took responsibility for his actions
- Good candidate for reinstatement
- Reinstated without compensation

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rg **Ridley Terminals Inc and ILWU, [2016] CLAD 116 (Saunders)**

- Terminated for posting video with insulting messages about employer and major customer
- Grievor did not create video
- Freedom of expression off-duty
- No right to harm employer interests
- Damages in lieu of reinstatement

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rg **Calgary and CUPE, [2015] AGAA 29 (Casey, QC)**

- Grievor used excessive amounts of employer time and stored massive personal documents on work computer
- Related to hobby of organizing and managing snooker association
- Grievance allowed in part
- Lack of progressive discipline

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rg **Calgary and CUPE**

- Termination excessive
- Reinstatement not appropriate
- Post termination Facebook comments destroyed employment relationship
- Personal attack against supervisor with derogatory, contemptuous language

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Tenaris Algoma Tubes Inc. and USWA Local 9548, [2014] OLAA 180 (Trachuk)

- Grievor terminated for vicious and humiliating comments about female co-worker on Facebook
- Apologized immediately and removed posts
- Grievance denied

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Tenaris Algoma Tubes

- Progressive discipline not appropriate
- Serious offence
- Employee does not “get one free sexual harassment” before termination
- Sexual harassment created poisoned work environment

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Background Checks

- Social media background checks are not unlawful but subject to privacy laws: *PIPA*
- Use caution when conducting background checks
- Employers must:

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Background Checks

- Ensure only relevant information is collected
- Ensure information is accurate and current
- Must not collect third party information

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