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Social Media and Privacy: What Employment Lawyers Need to Know
November 18, 2015
Meghan McCreary, Partner

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Agenda

1. **Employee Privacy Rights**
2. **Social Media in the Workplace**
   - Monitoring Social Media Use
   - Disciplining for Social Media Related Content
   - Harassment via Social Media
   - Social Media Background Checks
3. **Employers' Internet Policies**
   - Monitoring Technology use in the Workplace
   - Violation of Internet Use Policy
   - Grounds for Discipline & Dismissal
4. **What is New?**

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Employee Privacy Rights

- Saskatchewan: No equivalent provincial employment-related privacy legislation to date
- Useful guidelines for Saskatchewan:
  - Employers are required to act reasonably when collecting personal information, conducting background checks, or vetting candidates for employment
  - Reasonableness is dependent upon a number of factors, including: amount/type of information, purpose, intended use, disclosure, and reasonable alternatives

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Employee Privacy Rights

- *The Privacy Act (Saskatchewan)*
  - Creates a tort for a person to “willfully and without claim of right” violate the privacy of another person.
  - Rarely used.
  - Despite the lack of *PIPEDA*-equivalent legislation in Saskatchewan, it is arguable that some similar privacy obligations apply based on common law principles.
    - E.g. arbitration law in the unionized context.

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Common Law Interpretation

- Common Law: Reasonable Expectation of Privacy
  - Employers must achieve a balance between: 1) the employer's business objectives, and 2) the employee's right to privacy.
  - ***R v Cole*, 2012 SCC 53**
    - High school teacher's laptop contained nude photographs of minor student.
    - The evidence collected from the laptop violated Cole's *Charter* right to be free from unreasonable search and seizure.
    - Canadians have a reasonable expectation of privacy in their work computers where personal use is permitted or reasonably expected.

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Common Law Interpretation

- Reasonable Expectation of Privacy in the Workplace depends on:
  1) Whether the employee owns the hardware and/or software;
  2) Whether the technology is being used during business hours;
  3) The employer's policies surrounding internet and email use;
  4) Whether the employee has been made aware of the employer's policies; and
  5) The extent to which the employer's policies are regulated and consistently enforced.

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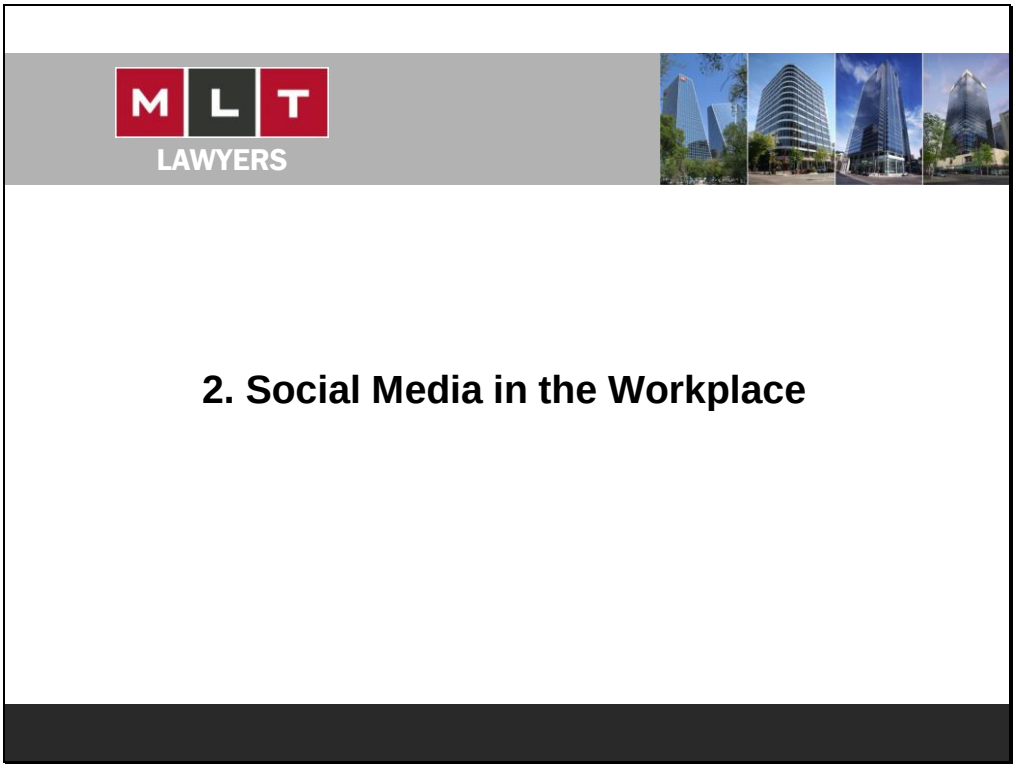

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Social Media in the Workplace
What is Social Media?
SOCIAL MEDIA EXPLAINED
TWITTER I'M EATING A #DONUT
FACEBOOK I LIKE DONUTS
FOURSQUARE THIS IS WHERE I EAT DONUTS
INSTAGRAM HERE'S A VINTAGE PHOTO OF MY DONUT
YOU TUBE HERE I AM EATING A DONUT
LINKED IN MY SKILLS INCLUDE DONUT EATING
PINTEREST HERE'S A DONUT RECIPE
LAST FM NOW LISTENING TO "DONUTS"
G+ I'M A GOOGLE EMPLOYEE WHO EATS DONUTS.
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Social Media Use

- Interesting Statistics:
  - December 2008: Facebook had **100 million** users.
  - March 2013: Facebook had **1.11 billion** active users.
  - January 2014: Facebook indicated that **1.23 billion** users were active on the website every month.
  - **Canada**: Country with **the most active Facebook users.**

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Social Media Use

- Social Media in the Workplace: Around the World 3.0
  - Nearly **90%** of businesses use social media for business purposes;
  - **>70%** of businesses reported having to take disciplinary action against employees for misuses (up from 35% the previous year);
  - **36%** of employers block access to social media sites;
  - **80%** of businesses have social media policies (up from 60% the previous year);
  - **52.43%** of employers' social media policies cover both use at work and outside of work;
  - **52.94%** of businesses updated their social media policies in the past year to help manage the risk of misuse;
  - **37.5%** of employers provide employees with training on appropriate use of social media.

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Monitoring Social Media Use in the Workplace

- Employers may sometimes be justified in monitoring an employee's online conduct:
  - ***Lougheed Imports Ltd. (cob West Coast Mazda) (Re),* [2010] BCLRBD No 190**
    - Two Mazda employees were terminated after making a number of posts on Facebook insulting the employer and their supervisors.
    - A supervisor noticed the comments and monitored their posts, even after he was "unfriended" by the employees.
    - Held: The employees did not have a reasonable expectation of privacy - the Facebook posts were visible to everyone on the employees' friend lists.

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Disciplining for Social Media Related Content

- Consider
  - Warnings, documentation, disciplinary letters;
  - Consistent application and monitoring;
  - Consider all relevant circumstances; and
  - Consider Collective Bargaining Agreement, where applicable.

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Harassment Via Social Media

***USWA, Local 9548 and Tenaris Algoma Inc.*, 2014 CanLII 26445 (ON LA)**

- Following end of a shift, grievor posted complaint about coworker on Facebook, without naming her,
- Comments between grievor and other employees escalated over two hours. Comments included:
  - Her work ethic;
  - Distinctive physical characteristics;
  - Suggestions of performing physically aggressive and violent and humiliating acts; and
  - A cruel nickname.

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Harassment Via Social Media

***USWA, Local 9548 and Tenaris Algoma Inc.*, 2014 CanLII 26445 (ON LA)**

- Grievor apologized and deleted posts when confronted by management.
- Grievor sent home pending investigation.
- Terminated.
- Arbitrator noted several factors in determining termination justified:
  - Vivacious, humiliating and public nature of comments
  - Grievor only employed 3 years prior to termination; no trust
  - Employee received training on relevant social medial policies

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Harassment Via Social Media

***Canada Post Corp v CUPW*, [2012] AWLD 2981 (Alta Arb)**

- The grievor, a postal clerk with 31 years of service made derogatory Facebook postings over a 1 month period about her supervisors.
- Postings were made during work and off of work.
- The postings were sent to more than 50 of the grievor's Facebook friends, including a number of co-workers.
- The supervisors required significant time off work for emotional distress after reading the postings.
- The grievor was terminated.

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Harassment Via Social Media

- Examples of postings:
  - **Oct 10; 1:03 AM Grievor Off Work:** Up and drinking again. 3 nights of freedom from Postal Hell. DIE BITCH DIE. I'm playing with the Voo Doo doll. If I wasn't drunk I would take it to the driveway and run the bitch over.
  - **Nov 4; 3:43 AM Grievor At Work**: Hello from stall 2. No sign of the evil [D] so everything going smooth so far. It's only 3 40 am so u never know. Her yes man [M] is here probably to make sure we don't take extra an extra minute on the lunch break gotta go sort.
  - **Nov 4; 8:53 AM Grievor Off Work:** It was a long night, 10 hrs in the mail mines. The Hag showed at 6 and the swoop through, I've never seen her without the UGLY coat. C'mon voo doo doll work your magic.

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Harassment Via Social Media

***Canada Post Corp v CUPW,* [2012] AWLD 2981 (Alta Arb)**

- There is ample case law that supports the principle that what employees write in their Facebook postings, blogs, and emails, if publicly disseminated and destructive of work relationships, can result in discipline.
- The fact that the grievor was under a misapprehension about who could access her Facebook site, did not relieve her from the responsibility of what she wrote.
- Termination upheld.

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Social Media Background Checks

- Risks of Social Media-Based Background Checks:
  - Too much information may be collected.
  - The information may be inaccurate, outdated or irrelevant.
  - Employers may inadvertently collect information about third parties without consent.
  - Potential to result in a launch of a privacy complaint.

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Social Media Background Checks

- Guidelines:
  - Consider conducting a privacy impact assessment regarding this activity to properly and thoroughly assess the risks associated with it;
  - Be productive in identifying the issues and risks associated, and determine how you propose to address them;
  - Don't wait until after you've conducted the background check to evaluate its compliance with legislation;
  - Don't assume that the subject individual will never find out that his/her social media profile was accessed to support performance of a background check.

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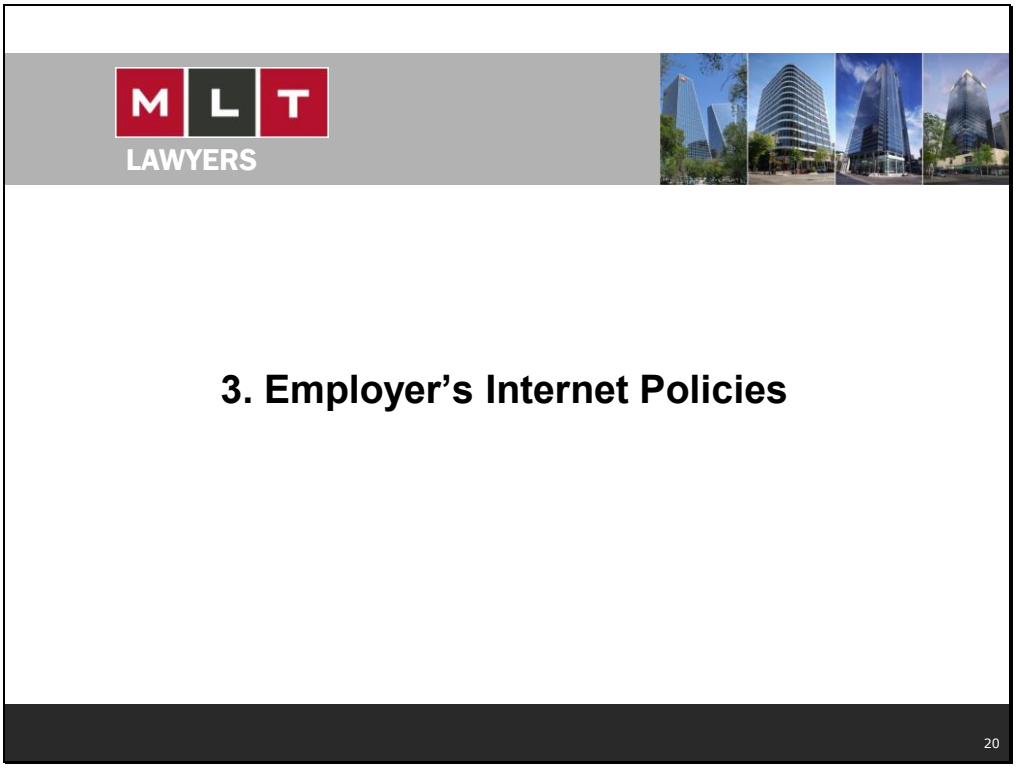

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Employer's Internet Policies

- Adopt *and* enforce policies that inform employees:
  - Who owns the systems (the employer);
  - Employer will monitor use of its systems;
  - Users have no expectation of privacy in email & Internet use on company system;
  - Acceptable & unacceptable uses;
  - Consequences of inappropriate use; and
  - Acknowledgment by employees, reminders and training.

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Monitoring Technology Use in the Workplace

- Unlike social media monitoring, monitoring technology use is strict.
- ***R v Cole:*** employees have a reasonable expectation of privacy in their workplace computers.

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Monitoring Technology Use in the Workplace

- ***Canadian Railway Company v Teamsters Canada Rail Conference,* CROA&DR 2900**:
  - Employer requested copies of an employee's cell phone records as part of an investigation into a train accident.
  - Held: Personal communications are, by definition, generally entirely unrelated to an employee's duties and responsibilities; however, an exception was found in this case, for several reasons:
    - Information received only indicated that the employee had been making a call at a certain time – the phone number and content of any text was blacked out;
    - Employer chose the least intrusive method of obtaining information; and
    - The employer had a carefully drafted policy which respected the privacy rights of the employee.

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Monitoring Technology Use in the Workplace

- ***SGEU and Unifor, Local 481*, May 16, 2015 (Allen Ponak) – arbitration decision**
- Grievor was an LR officer employed by Unifor
- Represented union members working in corrections facilities
- Rumors that he was involved with a criminal motorcycle gang – he denied current involvement
- Ministry of Justice denied grievor access to corrections facilities
- Employer searched grievor's personal email on employer's system for evidence of involvement with gang

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Monitoring Technology Use in the Workplace

- Employer discovered multiple emails between grievor and his wife with photo attachments evidencing gang activity by grievor. Employer dismissed grievor on this basis
- Employer sought to rely on emails and attachments as evidence at dismissal arbitration
- Emails ruled inadmissible as search of private emails found to be unreasonable
- Despite IT policy which stated employer owed and controlled email system and should not expect their communications or use to be confidential, grievor had reasonable expectation of privacy

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Monitoring Technology Use in the Workplace

- IT policy did reduce reasonable expectation of privacy, but did not extinguish it
- Arbitrator relied on ***R. v. Cole***
- Legitimate concerns re grievor's misconduct did not give employer *carte blanche* to conduct intrusive search
- Personal correspondence between spouses is the most intimate and private of communications
- Less intrusive alternatives should have been considered before search was conducted – such as interviewing grievor (again) and interviewing other witnesses

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Monitoring Technology Use in the Workplace

Advice for Employers:

- Develop a social media privacy policy:
  - Outline the type of technology that the employee can expect to be monitored.
  - Ensure that requests for information are reasonable and sufficiently related to business purposes.
  - Ensure that privacy is intruded as minimally as possible.
  - Obtain consent from employees whenever possible.

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Violation of Internet Use Policy – Blogging Photos

Thomas v IBEW Union 424 **(Alberta 2011)**

- Electrical apprentice working on the oil sands.
- Posted blogs about conditions in work camp.
- Complained about cleanliness of washrooms and limited menu selections resulting in deficient diet.
- Supported his complaints by posting pictures and videos of the facilities online.
- Terminated.

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Violation of Internet Use Policy – Blogging Photos

***Thomas v. IBEW Union 424* (Alberta 2011)**

- Site operator's policy expressly prohibited taking of photographs and videos.
- Employee brought grievance contesting his termination.
- Grievance dropped when union determined it had little chance of success.
- 'Duty of fair representation' complaint against union similarly dismissed.

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Violation of Internet Use Policy – Blogging Photos

***Thomas v. IBEW Union 424* (Alberta 2011)**

Takeaway:

- Clear employer policy saved the day
- Policy specifically identified "zero tolerance"

Sorry, but it's gotta go. Management says it could be used to access Facebook.

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Grounds for Discipline & Dismissal

***EV Logistics v Retail Wholesale Union, Local 580* (BC 2008)**

- 22 year-old employee published a blog about purchasing a Nazi SS uniform, made racist comments, and described various gruesome scenarios.
- Blog named his employer and described various workplace incidents.
- Employee terminated.
- Union filed grievance.
- Arbitrator ruled that some discipline was warranted but employee reinstated due to his young age, candid apology and honesty at the hearing.

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Grounds for Discipline & Dismissal

***EV Logistics v Retail Wholesale Union, Local 580* (BC 2008)**

Takeaway:

- Lengthy suspension without pay (from time of dismissal to reinstatement, several months).
- Employee's attitude clearly critical to how courts and arbitrators will decide the outcome – look at mitigating factors.

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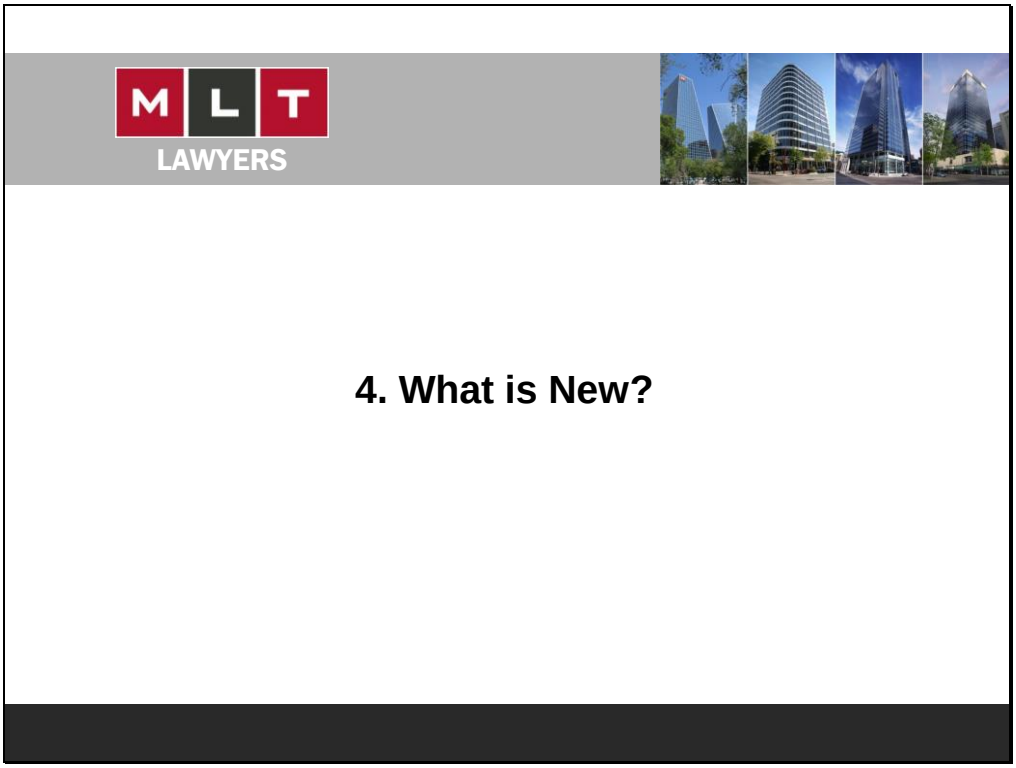

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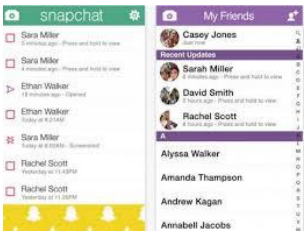
What is New?

- Snapchat.
- Free app that allows users to send “self-destructing” photos and videos to friends.
- Users have up to 10 seconds to view photo or video before the “snap” disappears.
- Does it really disappear?
- What are the risks to employers?



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What is New?

- The Wayback Machine is a digital archive of the World Wide Web and other information on the internet.
- Think you deleted that blog post from five years ago? The Wayback Machine can pull up the URL link to your personal blog that you have since deleted.
- Provides screenshots of old internet content.

WAYBACK MACHINE – HISTORY OF INTERNET

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What is New?

- Facebook Targets Workplaces with New Professional Networking Site
  - "Facebook is taking aim at the likes of Google and LinkedIn with a bid to drive business users to the social networking site.
  - The company is developing a site called 'Facebook at Work' that will allow users to chat and collaborate on documents with colleagues, and connect with contacts.

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What is New?

- Facebook Targets Workplaces with New Professional Networking Site
  - The new site is expected to look very similar to Facebook's interface, with its newsfeed and groups, but allow users to keep their personal information entirely separate from their work profile.
  - For the venture to prove a success, Facebook would have to win the trust of corporate IT chiefs and guarantee that information conveyed could not fall into the hands of rival businesses." [*The Guardian*]

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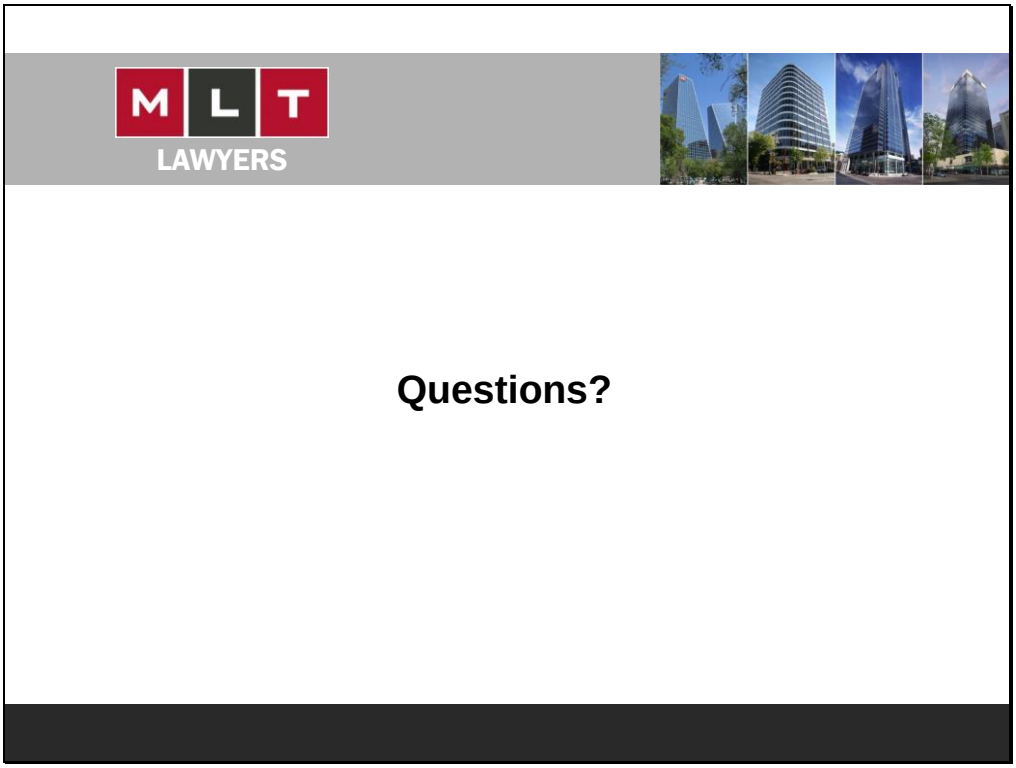

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