THE LAW SOCIETY OF MANITOBA

IN THE MATTER OF:

MEMBER A

- and -

IN THE MATTER OF:

THE LEGAL PROFESSION ACT

Hearing Dates: **January 23-24, 2023**

Panel: **Sarah A. Inness (Chair)**

Douglas Bedford

Susan Boulter (Public Representative)

Counsel: **Rocky Kravetsky for the Law Society of Manitoba**

Saul Simmonds, KC for the Member

REASONS FOR DECISION

Introduction

1. The Citation before this panel alleges professional misconduct on the part of the member by participating in the concealment of incriminating physical evidence so as to obstruct justice by hindering a police investigation, contrary to Rule 5.1-2A of the *Code of Professional Conduct* (*"the Code"*).

2. The charge arises out of the member's deactivation (not deletion) of his client's (Mr. F's) Facebook account while he was in police custody on an allegation of possession of a firearm, consisting of evidence provided to police from his co-workers and from Mr. F's publicly accessible Facebook account.

3. The member pleaded not guilty and the matter proceeded through a contested hearing before the panel. At the conclusion of the hearing, it was apparent that the issues centered on the interpretation and application of the Rule to the facts, which were mainly uncontested.

4. This a case of "first impression". Neither party was able to provide the panel with precedents from Manitoba, or other jurisdictions on *Rules* similar to section 5.1-2A of the *Code of Professional Conduct* (*"the Code"*), which reads:

5.1-2A A lawyer must not counsel or participate in the concealment, destruction or alteration of physical incriminating evidence or otherwise act so as to obstruct or attempt to obstruct the course of justice.

5. Upon consideration of all of the evidence, we conclude the charge alleged by the Society hasn't been proven on a balance of probabilities. The following reasons explain our decision.

The Member's Practicing History

6. Member A is a member of the Law Society of Manitoba (hereinafter "LSM"), having been called to the Bar on June 11, 2018, and the Law Society of Alberta, where he was admitted on February 25, 2021. He maintains practicing status in both jurisdictions. His primary practice has always been criminal defence work and has been so exclusively since April 1, 2019. He now shares space with several other criminal law practitioners in Calgary, Alberta.

7. The member completed his articles in Thompson, Manitoba, commencing with Legal Aid, then transferring to a private law firm due to administrative staffing issues at Legal Aid. He had been in practice for about one year at the time of the events, working as an associate at a criminal defence firm operated by a sole practitioner.

8. At the relevant time, the member's practice consisted mainly of conducting bail applications on behalf of accused persons, many of whom were Indigenous and from remote, northern communities. He quickly observed unfairness in the treatment of accused persons in pre-trial custody in the North, wherein they would remain in custody for periods of time, contrary to law and in violation of their Charter rights.

9. At the hearing, the member testified about his practice, which focused on the bail issues in Northern Manitoba. He litigated a series of court challenges on those issues, some of which resulted in written legal decisions that were provided to the panel. These decisions acknowledged his observations of "a broken bail system" in the North. See for example, *R. v. Balfour and Young*, 2019 MBQB 167; *R. v. Budd*, 2021 MBPC 13; *R. v. Crate*, 2022 MBKB 182.

10. The panel acknowledges the member's commitment to raise important legal issues through court challenges that shed light on the criminal justice system's treatment of the most disadvantaged and vulnerable populations ought to be commended. His decision and actions that resulted in his being charged and appearing before the panel, however, are not. The decision and reasons for the decision in this matter ought not to be taken as an endorsement of the member's actions and should not serve as an example to other members of what to do in similar circumstances.

Evidence

11. The evidence at the hearing consisted of an agreed statement of facts reduced to writing (ASOF) (Ex. 1), including an agreement that either party may call additional evidence that didn't contradict the ASOF. The member testified and was cross-examined by the Society.

12. The events giving rise to the charge commenced in June of 2019 when the Gillam RCMP were contacted by Mr. F.'s co-workers and employer who reported Mr. F. had possession of a gun and had made concerning comments about using it. Mr. F. was employed as a sub-contractor for a company in the Gillam community for a number of years. Mr. F. had posted photographs and video accessible to the public on his Facebook account, including comments about using a gun.

13. Mr. F. was arrested at 8:12 pm on June 30, 2019 and charged with possession of a firearm while prohibited from doing so, contrary to 117.01(3) of the *Criminal Code* and with possession of a firearm without being the holder of a licence, contrary to s. 92(3)(a) of the *Criminal Code*. During his initial interactions with the RCMP officers, Mr. F. was made aware that police had viewed his Facebook account and considered that his Facebook posts were evidence against him, including photographs of Mr. F. and of a firearm. At 9:00 pm, Mr. F. had a brief telephone conversation with his counsel, the member, who was acting for him on unrelated matters. The member learned the police were opposed to his client's release and he took instructions to apply for bail if he remained in custody.

What happens next, as set out in paragraphs 4.7-4.10 of the ASOF, is the heart of the evidence relied upon by the Society to prove the member's misconduct:

4.7 The next morning, at approximately 10:35 am, the RCMP met with Mr. F. and questioned him. The Facebook photos and video of the firearm were discussed.

4.8 Soon after, Mr. F. and Member A spoke by phone. The call went from 11:08 am to 11:22 am.

4.9 During that conversation Member A asked for and was given Mr. F's log-in credentials for his Facebook account. While on the phone with Mr. F, Member A logged in to Mr. F's Facebook account and de-activated it. The effect was to make the Facebook posting inaccessible.

4.10 At the time Mr. F's Facebook account was de-activated, the RCMP were viewing it. Upon deactivation they could no longer see it. Member A received the Crown's disclosure material from the RCMP by email at 1:33 pm on July 1, 2019, just before his appearance before a Judicial Justice of the Peace seeking Mr. F's interim release. This included screen shots from the Facebook Page. The email noted that in addition to the attachments there was also video from Facebook the file containing it was too large to be sent by email. Mr. F was not released that day. Copies of the three screen shots were filed in evidence (Exhibit 3).

14. The remaining facts establish that there was a further application for bail on July 2, 2019 before a Provincial Court Judge, which was adjourned to July 4, 2019 at the request of the Crown. In the meantime, a further Information was sworn

charging Mr. F. with unauthorized possession of a firearm, unsafe storage and careless use. He was released on bail on July 4, 2019, following a contested bail hearing. Transcripts of the appearances before the JJP and Provincial Court Judge were filed into evidence, by consent (Exs. 4, 5, 6).

15. The RCMP were later able to obtain a preservation order (date unknown) for Mr. F.'s Facebook account and were able to preserve the evidence from the deactivated account. A production order was then obtained against Facebook on July 17, 2019, which provided information about the internet address used to log into Mr. F.'s Facebook account at 11:14 am on July 1, 2019, when it was deactivated. On January 27, 2020 the RCMP obtained a production order against Shaw Communications which identified that internet address as being associated to the member. Documents obtained as a result of the production order were included in the ASOF.

16. The panel was advised, and accepted as evidence, that there is a distinction between deactivation of a Facebook account and its deletion. Unlike deletion of material on Facebook, which has the effect of permanently removing it from ever being accessible or retrievable to anyone again, including the account holder, deactivation merely removes the site from being accessible and upon reactivation, all account material that was on the site prior to deactivation is re-posted. It was an agreed fact that at some point between July 4, 2019 and July 25, 2019 the Facebook Account was reactivated. The member's testimony clarified that was done by Mr. F.

17. A pre-trial was scheduled for October 21, 2019 in Provincial Court, at which point the Crown and defence set out their respective positions. The Crown was going to speak to the two civilian witnesses (the co-workers who complained to the RCMP). The Crown needed to confirm if they were prepared to cooperate with the prosecution. Further, the strength of the Crown's case depended in part on the two witnesses' knowledge of weapons and their observations of Mr. F. In the meantime, a preliminary hearing date of March 3, 2020 was set. A copy of the pre-trial memorandum was included in the ASOF. On January 15, 2020, the Crown stayed the charges against Mr. F. According to the unchallenged evidence of the member, this was because following the pre-trial the Crown concluded there wasn't a reasonable likelihood of conviction.

18. On July 14, 2020 an Ontario Crown Law Office opinion letter was written to the RCMP based upon a comprehensive review of the investigation, including follow up assistance from the investigating officers. It concluded a prosecution of the member for a criminal charge of attempting to obstruct justice contrary to s. 139 of the *Criminal Code* of Canada was unlikely to succeed given the difficulty in proving the specific intent to attempt to obstruct justice as being the only reasonable inference from the actions.

19. On December 16, 2020, a complaint was made to the Law Society of Manitoba by the Chief Superintendent of the Criminal Operations, D Division section of the RCMP. That complaint led to the charge and disciplinary proceeding before the panel.

The Member's Testimony

20. The member testified that the first time he learned about a complaint regarding his deactivation of Mr. F.'s Facebook account was during the Law Society complaint process, which led to the hearing. His evidence at the hearing was consistent with the ASOF but provided his explanation for the deactivation.

21. His first conversation with his client on June 30, 2019 was brief, he being advised only of the charges themselves. He told his client to contact him if he wasn't released, though he expected he would be released. When he received a call again on July 1, 2019 at 11:00 am, initially from Cst. Benoit of the RCMP, he was surprised his client hadn't been released. Cst. Benoit told him that the Crown approved Mr. F. being remanded into custody. The member had an eight-minute phone conversation with Cst. Benoit about the charges and the evidence. As a result of that call, he believed the co-worker's complaints to police arose from postings on Mr. F.'s Facebook account, which postings included antisemitic material and a reference to ownership of a gun. The police hadn't located any gun.

22. He "surmised" the police and Crown had Mr. F.'s entire Facebook postings because he had been told about Facebook evidence by the police; because the police asserted they had reasonable and probable grounds to arrest his client; and because the Crown had approved a remand into custody following charges, which in the member's experience meant that the police must have provided to the Crown the relevant evidence they then had. The member explained that for an

accused person to be remanded into custody, the practice was for the police to obtain Crown consent and that to secure that consent, some disclosure to the Crown relating to the alleged offences would be necessary.

23. From 11:08 am until 11:22 am, the member and his client spoke on the telephone. He wanted to see the Facebook material the police were referring to so he could better understand the case against his client. The member obtained Mr. F.'s Facebook log-in credentials and his consent to use them in order to log into the account. He saw a crossed-out Israeli flag on the front status page of the account, consistent with the suggestion of "antisemitic" material that was concerning to Mr. F.'s co-workers. He also saw a photo of Mr. F. with his daughter and, further, a post that stated, "got my SKS only 110km south of Gilliam not afraid to use it ! Bang Bang", as well as a video of Mr. F. and his brother using a firearm with a caption, "my brother got trigger happy". He couldn't recall whether he saw anything else prior to deactivation of the account. He never reviewed the entire account.

24. The member testified that he couldn't comprehend how the Facebook postings could amount to evidence of the offences. He believed that the prosecution required a physical weapon and that a charge of possession of a weapon couldn't be proven by these Facebook postings. His client had told him that he believed the complaint stemmed from hunting with co-workers and their disapproval of his political views regarding the state of Israel. He had been made aware that his client told police he no longer had a gun, having disposed of it long ago in the river.

25. During the telephone call with his client, the member was concerned with the timeliness of a bail application, given the difficulties with the bail system in the North (discussed above) and the client's potential loss of employment. He discussed bail plans with his client and his desire to continue his work in Gillam or reside with his sister in Thompson as an alternative plan. During the conversation with his client, he used the Facebook account to communicate directly with Mr. F.'s sister to discuss the alternative bail plan as the easiest and most likely method of reaching her.

26. The member told his client, as he does with other clients on occasion, to "relax" on Facebook postings. The member believed that the postings relating to Israel were upsetting his client's co-workers and would make it more difficult for him to

return to work, which was an important part of his bail plan. He obtained his client's instructions to go into the settings option, where the choice is given for account deactivation or permanent deletion, then selected and clicked on deactivation.

27. The member testified he never deleted or removed anything from the account. He only deactivated it. He was aware that deactivation would make it inaccessible but in doing so, he never intended to hinder or interfere with the police investigation. He didn't believe the material was incriminating physical evidence. He believed that deactivation of the Facebook account so as to make inaccessible the offensive materials in his client's public Facebook account would minimize the aggravation to his co-workers, thereby making it easier for them to co-exist with his client. He didn't turn his mind to the effect of deactivation, if any, on the police investigation.

28. The member was unaware the RCMP were viewing Mr. F.'s Facebook account at the time he deactivated it. He assumed the police already had the Facebook postings they had described to him as evidence against his client. He assumed the police had downloaded what they needed already, but he admits that he never made any inquires of them, nor did he turn his mind to his professional obligations under the *Code* in that moment. He focused on matters of bail and assisting his client to return to work.

29. At 1:33 pm on July 1, 2019, Cst. Panteluk, one of the main investigating officers, emailed disclosure directly to the member. The disclosure package contained copies of the Facebook photos, the post referencing the comments regarding the SKS, and reference to video from Facebook in possession of the police which was too large to email. This confirmed the member's earlier belief the police had the evidence from the Facebook account they thought relevant. It also contained a photo of a firearm with a caption, "This is my Rifle !!! There are many like it but his one is mine..." on a page with date of August 17, 2016 next to the word "Follow". The member didn't recall whether or not he viewed that photo/post prior to deactivation. He also testified that the disclosure confirmed his belief that none of the Facebook material substantiated the charge of possession of a firearm or was relevant to proving it, having regard to the nature of the material, the charges, and what he assessed to be the dated nature of the 2016 photo/post.

30. No concerns were raised by the officers or the Crown about deactivation of the Facebook account or interference with the police investigation during the JJP hearing, or the bail proceedings that subsequently took place. Furthermore, the Crown never requested that Mr. F. be prohibited from accessing Facebook as a condition of his release. The concerns raised by the Crown at the bail related to the nature of the firearm and whether it was readily accessible to the accused, as well as his potentially antisemitic views. Finally, no issues were raised regarding potential destruction of evidence or interference with the police investigation in any other proceeding, including the pre-trial conference for the preliminary inquiry.

31. The member testified that he would handle the situation differently today. He would consider making inquiries of the police or the prosecution to determine if they had a position on him deactivating the account. He would consult others for advice, for example the Society. He now has readily accessible, senior, experienced lawyers working in the same office from whom he can seek advice and assistance in such situations.

Protection of the Public

32. The legal profession is self-regulating. The purposes underlying disciplinary proceedings against a lawyer are described in *The Legal Profession Act* C.C.S.M. c. L107, section 3: 3(1) *The purpose of the Society is to uphold and protect the public interest in the delivery of legal services with competence, integrity and independence*: See *R. v. Nadeau*, supra, at p.1. It cannot be overstated: protection of the public interest is paramount.

33. In *Lawyers & Ethics: Professional Responsibility and Discipline, Gavin MacKenzie ("MacKenzie"), Carswell 2012, Release 3,* the author comments on the purposes of discipline proceedings, at p. 26-1: *It is recognized that the purpose of law society discipline proceedings are not to punish offenders and exact retribution, but rather to protect the public, maintain high professional standards, and preserve public confidence in the legal profession. In cases in which professional misconduct is either admitted or proven, the penalty shall be determined by reference to these purposes.* These purposes were accepted as applicable to LSM proceedings in *The Law Society of Manitoba v. Nadeau*, 2013 MBLS 4 (p.1); *The Law Society of Manitoba v. Sullivan*, 2018 MBLS 9 (para.8).

Burden and Standard of Proof

34. The burden of proving the offence lies on the Society, on a balance of probabilities standard. While evidence in every case must be clear, convincing and cogent to satisfy the balance of probabilities test, there remains only one standard of proof, and that is on the balance of probabilities, regardless of the nature or seriousness of the case. In short, the Society bears the burden of proving it is more likely than not that the member is guilty. See *F.H. v. McDougall*, 2008, paras. 44-49; *Fitzpatrick v. Alberta College of Physical Therapists*, 2012 ABCA 207, [2012] AJ No. 680, paras. 12-15; *D.(T.) v. Manitoba (Director of Child and Family Services)*, 2015 MBCA 74, para. 41; *Doolan v. Law Society of Manitoba*, 2016 MBCA 57, para. 87.

Interpretation of Section 5.1-2A

35. Arguments were advanced by each side regarding the elements of this offence and whether it is one of strict liability, or one which imputes some component of intent, or knowledge, given its character and wording.

36. The position of the Society is that the offence is disciplinary in nature. The proceedings are regulatory, not criminal. Neither the nature of the offence nor its wording takes it outside of a strict liability offence. If the offence is strict liability, once the Society has proven the act or omission *(actus reus)* which constitutes the charge on a balance of probabilities, a conviction will result unless the member can establish a reasonable excuse for the act/omission, for example by having taken reasonable steps to avoid the misconduct by exercising all due diligence or reasonable care, or having had a reasonable belief in a mistaken set of facts. See *The Law Society of Manitoba v. Langford*, 2020 MBLS 5; aff'd 2021 MBCA 87; see also *The Law Society of Manitoba v. Sullivan*, 2018 MBLS 9 at paras. 26 and 30; *Riccioni v. Law Society of Alberta*, 2015 ABCA 62.

37. The Society further submits that the due diligence defence is assessed in the same way for all members, regardless of years at the bar or degree of experience. To do otherwise would be contrary to the purpose of protection of the public and the standard of competency required of all members. Reasons that do not support a defence but are mitigating are relevant only to the penalty phase, should the member be convicted.

38. The member argues the offence is quasi-criminal in nature and imports some aspect of *mens rea*, such as knowledge or intent. Simply put, proof of the *actus reus* alone is insufficient. Furthermore, if it is a strict liability offence, the "reasonableness" of the due diligence or belief asserted by the member is assessed on a modified objective test, considering the background and circumstances of the member and the context in which the member's actions are being assessed. The member's actions in this case, it is argued, while not laudatory or well-advised, were reasonable in the unique circumstances of the case.

39. The approach to statutory interpretation in the leading decision of the Supreme Court of Canada in *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC) supports the strict liability interpretation argued by the Society, in that the court held, *"Today there is only one principle or approach, namely the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."* The drafters provided guidance in the preface to the *Code of Conduct*, which states, *"The Code of Professional Conduct that follows is to be understood and applied in the light of its primary concern for the protection of the public interest."*

40. Furthermore, the jurisprudence appears to be well-established that disciplinary proceedings are regulatory and hence strict liability offences: *Doolan v. Law Society of Manitoba*, 2016 MBCA 57, para. 29; *The Law Society of Manitoba v. Langford*, 2020 MBLS 5 (aff'd 2021 MBCA 87); *The Law Society of Manitoba v. Sullivan*, 2018 MBLS 9; *Riccioni v. Law Society of Alberta*, 2015 ABCA 62.

41. The panel is unable to "read into" section 5.1-2A a requirement to prove intent that is not contained within the wording of the section itself. The offence, though serious in nature, is being prosecuted in the context of disciplinary proceedings. While it has the potential to carry consequences as severe as disbarment, not unlike other disciplinary proceedings, it isn't criminal. The nature and potential consequences of a criminal prosecution are distinguishable.

42. Strict liability offences, unlike absolute liability offences, allow for the member to proffer a due diligence defence, should the *actus reus* of the offence be proven by the Society. The burden of proof still rests on the Society to prove the *actus reus* of the offence it alleges amounts to professional misconduct. Once that has been done, it is the member who can draw on their knowledge of what happened and

explain their actions in an effort to establish a due diligence defence. This provides a defence to members, should they have one, unlike absolute liability offences where conviction flows automatically upon proof of the *actus reus*.

43. If knowledge or intent were required to be proven by the Society, it would be placed in a difficult, if not impossible position, given that often only the members themselves know the reasons or explanation for their actions. This would have the potential to create an insurmountable hurdle in many cases, which would defeat the overarching purpose of the protection of the public. Therefore, the panel agrees with the Society that the offence is one of strict liability.

Discretion of the Panel

44. The member argues that criminal defence counsel find themselves in difficult situations where a myriad of competing factors and obligations present themselves in unforeseen circumstances. Judgment calls are a necessary requirement of being a lawyer and from time to time the lawyer will be wrong, however it doesn't necessarily follow that the member is guilty of professional misconduct and deserving of conviction and sanction. The member therefore submits that some residual discretion rests with the panel to dismiss a proven charge under a breach of section 5.1-2A of the *Code*. See *Law Society of Upper Canada v. Carey*, 2017 ONLSTH 25, at paras. 50, 60, 62; *LSBC v. Harding*, 2022 BCCA 229; *The Law Society of Upper Canada v. Carey*, 2017 ONLSTH 25; *Luk v. Law Society of Manitoba*, 2011 MBCA 78, para. 11.

45. The Society's position is that the conduct forming the underlying allegation in *Luk v. Law Society of Manitoba*, 2011 MBCA 78 was a breach of the *Rules* of the Society pertaining to the obligation to notify the Society in timely fashion of a mistake made in practice, and the use of the word "may" in the relevant section imports discretion in determining whether a conviction for professional misconduct for that type of breach ought to be found. The charge against the member, being an alleged breach of the *Code,* is distinguishable.

46. Having reviewed the *Rules* and the *Code*, we are unable to find any discretion regarding a breach of the *Code* without reading in same. The cases relied upon by the member are distinguishable. The case of *LSBC v. Harding*, 2022 BCCA 229 involved a determination of whether the lawyer's in-court statements crossed the

line from incivility to professional misconduct. In the *Law Society of Upper Canada v. Carey*, 2017 ONLSTH 25, the dismissal of the charge was founded on a mistaken belief similarly held by other, experienced members of the profession, which made his belief reasonable in the very unique circumstances of that case.

47. Relief from conviction for a proven breach of Rule 5.1-2A, as we interpret the Rule 5.1-2A and the jurisprudence, would require a due diligence defence to succeed. There is no other, residual discretion afforded to the panel that we can find.

Proof of the Citation

48. The Society alleges that the deactivation of the Facebook account amounted to "concealment of incriminating physical evidence so as to obstruct the course of justice by hindering a police investigation". The Society doesn't allege alteration or destruction of any physical evidence, and there is no evidence of either here.

49. The position of the Society is that concealment has been proven by deactivation, which deactivation is admitted by the member. The Facebook site contained physical incriminating evidence, as it was evidence relevant to proving the charges against Mr. F. Deactivation made the Facebook site unavailable to police when they were viewing it. The Society submitted that this bare, admitted fact was sufficient to establish an obstruction of the course of justice by hindering the police investigation. The Society clarified in oral argument that it alleges an obstruct, not attempt, because deactivation prevented the police from continuing their investigation by preventing them from further viewing the Facebook account on the morning of July 1, 2019. On this basis, it is argued, the *actus reus* has been proven on a balance of probabilities. The Society argues that paragraph 4.10 of the ASOF is key evidence in proof of the *actus reus* of the offence.

50. The Society argues that it is not necessary for it to prove the loss of relevant evidence by virtue of deactivation. It was the investigation itself that was obstructed because at the moment of deactivation, the RCMP were viewing Mr. F's Facebook account and couldn't continue to do so. Obstruction, it argues, doesn't require some additional proof that the hindrance was not overcome subsequently through a preservation order or reactivation of the Facebook account.

51. The member argues that the Society hasn't proven the *actus reus* of the offence. He asserts that he "may have approached the line but he never crossed it". Further, he submits that the material on the Facebook account wasn't illegal or incriminating physical evidence. The member says he reasonably believed the evidence from the Facebook account was available to police because they had already viewed his client's Facebook account and identified material on it. He assumed they had all of its contents. His belief that the evidence was otherwise available to police takes his actions outside the ambit of the section, according to Commentary 1, if it was "reasonable" or, alternatively, if it did not have the effect of obstructing justice because the police already had the Facebook contents or subsequently were able to obtain them.

52. The member asserts that even if the police were hindered, the course of justice was not obstructed. He asserts the police didn't have an entitlement to view the Facebook account again. Many actions taken by defence counsel have the effect of "hindering" the police, for example advising a witness they don't have to speak with police, or advising an individual they need not submit to arrest inside their home in the absence of a warrant, however that advice isn't obstructing the course of justice.

53. The member asserts there is no evidence before the panel of hindrance that obstructed the course of justice. At the point when deactivation took place, police had all the necessary and relevant information needed. There is no evidence that any physical incriminating evidence not yet seen by the police was concealed by the deactivation. The Society must prove that by deactivation, incriminating physical evidence was lost to police or at a minimum, there was some impediment in their obtaining it. Something more is required, argues the member, to establish the *actus reus* of this offence than simply establishing that when deactivation took place, the RCMP were viewing the Facebook account. It is noteworthy, the member argues, that no mention of any concerns or issues related to hindrance of the police investigation, including the deactivation, is raised throughout the proceedings against Mr. F.

Analysis

54. Turning to consideration of the charge and whether it has been proven, Commentary 1 under section 5.1-2A is relied upon by the member in his argument that his actions take him outside of the ambit of the rule:

[1] In this rule, "evidence" does not depend upon on admissibility before a tribunal or upon the existence of criminal charges. It includes documents, electronic information, objects or substances relevant to a crime, criminal investigation or a criminal prosecution. It does not include documents or communications that are solicitor-client privileged or that the lawyer reasonably believes are otherwise available to the authorities.

55. The member's testimony was that he believed the police had all material from the site at the time he deactivated it. Accepting that was his subjective belief at the time, it is not objectively reasonable given his own evidence. He made an assumption the police had completed their investigation into the Facebook account and had downloaded all the evidence. A firm basis to make that assumption is lacking. While he knew police had an interest in Mr. F.'s Facebook account and had seen some material on it that they were interested in as part of their investigation, he had no knowledge of whether they had downloaded anything at all, as opposed to viewing postings, when he deactivated the account. He had no knowledge of whether they were done with their review of the account. He made no inquires of police to that effect. There is no evidence that the RCMP constables to whom he spoke told him that they had downloaded everything from the site or even those portions of interest to them. He acknowledged that he didn't look at everything on the account. He assumed they "had it". Assumptions by lawyers in such circumstances cannot be said to be reasonable.

56. Having concluded the member's subjective belief that Facebook account evidence was otherwise available to police wasn't reasonable, we still must consider whether the Society has put forward sufficient evidence to prove the offence. The offence alleged is one of obstruction, not attempt to obstruct. (Parenthetically, the criminal law opinion, based on the fulsome investigation and with the cooperation of the investigating officers, examined the likelihood of proving an "attempt" to obstruct, not obstruction. This suggests that the parties involved in seeking and preparing that opinion did not conclude that there had

been actual obstruction.) What the member believed or assumed isn't a component of the *actus reus* that must be proven by the Society on a balance of probabilities standard. The heart of the issue in this case, and upon which the parties were in dispute, was whether the evidence before the panel was sufficient to prove the *actus reus* on the balance of probabilities standard.

57. We find that deactivation of the Facebook account, which rendered it inaccessible to the public, including police, had the effect of "concealing" it. The ordinary, oxford dictionary meaning of "conceal" is to "keep from sight; hide; keep secret", which accords with a plain language interpretation and with the intent and purpose of section 5.1-2A of the *Code* as we understand it. The member's actions in deactivating the Facebook account had the effect of concealing information, regardless of whether the account was until then "in the public domain", as argued by the member.

58. Furthermore, we find that the electronic information in the Facebook account comprised incriminating physical evidence (which by definition includes electronic documents), that was relevant to proving the charges of possession of a firearm against Mr. F., despite the member's argument otherwise. The evidence police obtained from the Facebook account may be relevant in multiple ways, including to corroborate the allegations of the civilian witnesses, as potential statements against interest and in determining risk to public safety for bail purposes.

59. Having determined the above, it remains to be decided whether deactivation of the Facebook account obstructed the course of justice by hindering the police investigation. All of the facts in evidence must be considered and weighed to determine whether the offence has been proven. While we may draw factual inferences from proven facts, if they are reasonably capable of supporting those factual inferences, the parties agreed we cannot speculate. Speculation isn't evidence. In determining whether there is sufficient evidence to establish the *actus reus* in the ASOF, as argued to us by the Society, we must consider the effect of the totality of the evidence.

60. We accept there is no evidence that deletion of any material occurred. We cannot conclude that it did or didn't happen. Regardless, it isn't necessary for the Society to prove actual loss of incriminating physical evidence resulted from the deactivation in order to prove the charge. It must prove, however, that the

member's actions in concealing incriminating physical evidence obstructed the course of justice by hindering the police investigation.

61. The facts in evidence, contained in the agreed facts, and in particular paragraph 4.10 state the "RCMP were viewing" the Facebook page at the time it was deactivated. There is no other direct evidence. The Society argues that the fact the RCMP were viewing the Facebook account at the moment of deactivation is evidence of obstruction. It argues the deactivation prevented the RCMP from continuing to view the account; it could no longer do so. However, the RCMP had received the complaint in June of 2019 and effected the arrest of Mr. F. on June 30th. It may well have completed its investigation of the Facebook account in its entirety following the complaints by the co-workers, prior to the arrest of Mr. F., or in the intervening time between his arrest on June 30, 2019 and July 1, 2019 when it was deactivated. The agreed fact doesn't stipulate which RCMP were "viewing" the account, and whether it was the investigating officer(s) or someone else. We don't know whether the account was being viewed for an investigative purpose or some other reason, for example curiosity. We do not know how much more, if any, investigation the RCMP were going to do with the Facebook account at the time of deactivation. It would be speculative to make the finding urged upon us by the Society, based on this evidence.

62. The panel reviewed the transcripts of the court appearance before the JJP, the contested bail hearing that took place on July 2, 2019 and continued on July 4, 2019, as well as a copy of the pre-trial memorandum, filed in evidence. Whether a person is releasable on bail includes consideration of the risk posed to the safety of the public, including any interference with the administration of justice. No concerns about hindrance or obstruction were raised by police or Crown during the bail hearings involving Mr. F. Furthermore, when Mr. F. was released on bail the Crown never requested that he be placed on conditions restricting or prohibiting him from accessing his Facebook account, social media, or the internet. No concerns about hinderance or obstruction were raised at the pre-trial conference either.

63. The ASOF doesn't stipulate the reasons why the RCMP sought and obtained the Preservation and Production Orders. The ASOF at paragraphs 4.12 to 4.14, read in its entirety, sets out the orders relevant to the investigation into identifying the

individual responsible for deactivation, which arguably were not relevant to further the investigation into the charges against Mr. F.

64. There is no viva voce evidence from the investigating officers. We do not speculate as to why that evidence wasn't called by the Society. We recognize there may be many valid reasons why that wasn't done. The ASOF was drafted by experienced counsel and was no doubt carefully and thoughtfully crafted. Regardless of the reasons why the evidence came in the form it did, that is the evidence upon which we must decide this case.

65. We recognize the argument that one could infer from the fact that the RCMP were looking at the Facebook account at the moment of deactivation that this impeded their investigation and, hence, "obstructed the course of justice". However, as we have observed, we believe that to do so requires us to go beyond making an inference and to speculate that the reason the RCMP were looking at the account at that moment was for an investigative purpose, that they were still continuing in their investigation into the Facebook account, and that deactivation somehow prevented them from continuing in their investigation of it. And, given the absence of any contemporary complaint from the RCMP or the Crown regarding the deactivation, we believe that to make the inference pressed on us would be in conflict with the obvious inference to be drawn from that further fact – the RCMP were not of the view that their investigation had been obstructed. As stated earlier, the evidence in every case must be clear, convincing and cogent to satisfy the balance of probabilities test. In sum, there is insufficient evidence that the deactivation of the Facebook account obstructed the RCMP investigation of Mr. F.

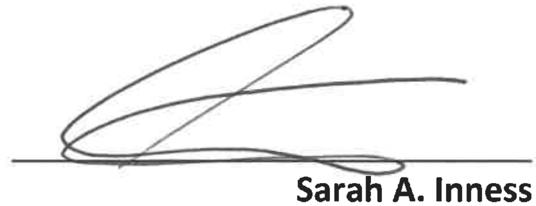
Decision

66. This was a difficult case and a close call. For the reasons described above, based on the evidence before us, we find the Society hasn't proven that it is more likely than not that the offence alleged occurred and we therefore find the member not guilty.

Disposition

67. The charge is dismissed.

Dated this 10th day of February, 2023.



Sarah A. Inness

Douglas Bedford

DISSENT

68. The Citation alleges that the member failed to abide by Rule 5.1-2A of the *Code of Professional Conduct* of the Law Society of Manitoba, which states:

A lawyer may not counsel or participate in the concealment, destruction, or alteration of physical incriminating evidence or otherwise act so as to obstruct or attempt to obstruct the course of justice.

Interpretation:

69. There are four parts of the Rule that must be met in order to assess guilt. I will address those parts in the order presented in the Rule.

Part one: *A lawyer may not counsel or participate….*

70. The parties in the Statement of Facts, and the Panel agreed that the member did participate in the action of de-activating the client's Facebook page. The action taken by the member is not disputed.

Part Two: i*n the concealment, destruction or alteration…..*

71. The statement of facts, and the Panel agreed that the de-activation did not destroy or alter the Facebook page, but had the effect of concealing the client's Facebook page and contents from view.

Part Three: *…of physical incriminating evidence…..*

72. The member testified that he knew that the RCMP thought the Facebook page content was important. He was told this by the Officers and his client, prior to the de-activation.

73. Furthermore, the member admitted that, at the time he de-activated the page, he had not viewed the entire Facebook page content. Thus, he was unaware of whether there was additional, and potentially more damaging, evidence against his client.

74. Lastly, the member testified that he thought the Facebook citations he was forwarded later, after de-activation, by the RCMP were not enough to support the charges. Yet he knew that there was more evidence the RCMP were considering- the Facebook video that was too large to send, the complaints from two co-workers in which they expressed concern about the client, his verbal statements, the alleged "lifelong" prohibition against firearm possession and his access to a firearm. The RCMP were evaluating all the pieces of the evidence to determine the client's actions.

Part Four: *...so as to obstruct or attempt to obstruct the course of justice.*

75. The de-activation occurred when an RCMP officer was looking at the Facebook page, causing the page to disappear. He was an officer of the law undertaking an investigation which was stopped by the de-activation. While my fellow Panel members disagree, I believe the course of justice was obstructed.

Analysis:

- Co-workers of the client filed complaints about the client with the RCMP because of his threatening and racist comments, his access to firearms and his postings on Facebook.
- The RCMP were aware of previous charges and a court ordered weapons prohibition against the client.
- The RCMP arrested the client at 8:12 pm June 30, 2019. According to the Statement of Facts, "in his initial interactions with the RCMP officers, Mr. F. was made aware that they had viewed his Facebook page and considered that his Facebook posts were evidence against him. This included photographs of Mr. F. and of a firearm." Mr. F. Immediately asked to speak to his lawyer, the member.

- According to the member's testimony, the Gillam RCMP called at 9 pm, and advised him of the client's arrest and charges. The Law Society Counsel put it to the member that he knew of the RCMP's interest in Facebook before talking to his client. The member replied "I did not take notes, but knew it was of interest to the RCMP".
- The client and member then talked, and the member undertook to apply for bail. The client also knew of the RCMP's interest in the Facebook postings.
- The member, indeed any member of the public, could access Facebook page content without any password. Such viewers cannot conceal, destroy or alter another person's Facebook page.
- The member did not access the Facebook page after the 9 pm call, or in the next 13 hours, to view and determine the extent of the evidence.
- At 10:15 am the next day (July 1) the RCMP met with the client and discussed the Facebook photos, video and posts.
- At 11 am, in an eight-minute call, the RCMP discussed the evidence with the member. It is noteworthy that the RCMP briefed the member on the importance of the Facebook page content to the investigation. During the course of this call, he did not view the Facebook page.
- The member did not ask, nor was he made aware, of the extent to which the RCMP had viewed, downloaded or copied the content, or whether their review of the evidence was complete. At this point, he did not have the copies of the Facebook page postings that he would later receive. He testified that he "assumed" the police had all the information they needed.
- The member talked to his client from 11:08 to 11:22 am, during which he asked for and received the Facebook log-in information and password. While on the phone, the member quickly viewed, and then de-activated the page.
- As noted above, the consequence of his de-activation, was that the concurrent police review of the page was immediately stopped in its tracks.
- In the RCMP investigation log (July 1 11:37 am) "Upload Facebook" activity was marked "not completed".
- When the member de-activated the account, and as he was admittedly unaware of the extent of the Facebook content, the member said that he did not give his action careful thought as to the effect on the investigation or his duties as a lawyer.
- The member did not seek advice from the Law Society, his firm's senior lawyer or any other lawyer. In his testimony, he confirmed, if the situation presented itself again, he would seek such advice.

- The member said he de-activated the account so that the co-workers would no longer have to view it. The co-workers were not likely to forget the content, even when it was no longer on Facebook. In his testimony, the member agreed with the Law Society Counsel that he understood that no one could see the Facebook page when he de-activated it.
- Later that day, after the de-activation, the member received copies of the Facebook postings (except for a video recording that was too big to send). The member said that these confirmed his belief that the postings were not incriminating enough to warrant charges. The member could not have concluded that the evidence was not incriminating at the time of the de-activation. Further, he had not seen the video. The RCMP had indicated that they thought the Facebook content was important. In essence, it was not the member's prerogative to dismiss the relevance of the evidence.
- In his testimony, the member advised the Panel that the client's weapon prohibition was not lifelong, but rather a ten-year term, which had expired.
- The RCMP obtained a Preservation Order to Facebook to preserve evidence from the de-activated account. They also obtained a Production order against Shaw Communication, to learn the IP address origin of the de-activation was that of the member. Clearly, the RCMP were interested in the de-activated account content.
- The client re-activated the Facebook page sometime between July 4 and July 25, 2019. In his testimony, the member said that he "always" tells his clients to "relax" Facebook postings. He did not tell the Panel if he so advised this client, prior to or after the re-activation. However, according to the Ontario Ministry of the Attorney General July 14, 2020 letter, the client changed his Facebook account vanity name, which made the account "no longer searchable by name".
- At the October 21, 2019 pre-trial hearing, the Crown advised it had two witnesses to the possession of the weapon.
- On January 15, 2020, the Crown stayed charges against the client.
- Criminal prosecutions must show intent and provide proof beyond a reasonable doubt. Charges under the Law Society *Rules* do not require identification of intent, and the case is assessed on the balance of probabilities.
- Intent is only relevant in the penalty phase of the Law Society hearing process as a possible mitigating factor. Since this charge is not proceeding to assessment of penalties, intent is not considered.
- The RCMP asked the Ontario Crown to assess the viability of charging the member. On July 14, 2020, the Ontario Crown concluded that prosecution of the

member for criminal charge of attempting to obstruct contrary to the *Criminal Code* was unlikely to succeed, since it was difficult to prove specific intent.

- On December 16, 2020, the RCMP filed a letter of complaint against the member with the Law Society of Manitoba. The RCMP are aware that filing a letter of complaint against a lawyer is a serious action with the potential for disciplinary action.
- My fellow Panel members note that since the RCMP and the Crown did not mention the de-activation and the interrupted RCMP viewing in their statements during Court appearances, this indicated, to them, that this was not important to the case. This omission was a factor in their deliberations and majority decision.
- I view this differently. The RCMP application for and securement of a preservation order from Facebook; a production order from Shaw Communication; the opinion of the Ontario Crown on the viability of criminal prosecution of the member; and the filing of the complaint with the Law Society of Manitoba are measures of the RCMP's concern about the missing Facebook page and, eventually, the member's actions.
- The Law Society Counsel advised the *Code* should be foremost in the minds of attorneys at all times. The member testified he was aware of the *Code* and *Rules* of the Law Society but did not turn his mind to them. The Society stated that all lawyers, regardless of the length of their tenure in the profession, must follow the *Rules* and be aware of the *Code of Professional Conduct*.

Decision:

76. I agree with the facts of the case.

77. Most respectfully, I disagree with the conclusion drawn by my two fellow Panel members, and find that the member did, on the balance of evidence carry out the act of concealment of incriminating evidence and obstruct the course of justice.

Dated this 9th day of February, 2023.

Susan Boulter (Public Representative)