

**COLLEGE OF PHYSICIANS AND SURGEONS OF NOVA SCOTIA
SUMMARY OF DECISION OF INVESTIGATION COMMITTEE "C"**

Re: Dr. Christopher Milburn, Licence No: 012369
Decision: Dismiss Complaint

OVERVIEW

Investigation Committee "C" investigated matters arising from a Complaint filed by a number of individuals and organizations in January, 2020.

The complainants' concerns arose out of comments made by Dr. Milburn in an editorial letter to the *Chronicle Herald* newspaper, a television interview on the Canadian Television Network (CTV), and a subsequent rebuttal letter in the *Chronicle Herald*.

Dr. Milburn had made these comments in reference to the criminal proceedings of *R. v. Fraser* and *R v. Gardiner*. These cases were court decisions involving the convictions of special police constables for criminal negligence in the death of an individual in custody at a detention facility.

The complainants suggested that Dr. Milburn's comments were stigmatizing and insensitive and did not uphold the reputation of the medical profession.

Among other things, the complainants had concerns about Dr. Milburn's public comments where they allege he:

- referred to a group of patients as "criminals" or the "criminal element", and implied they were not due the same level of care as other patients;
- failed to cite evidence to support his claims that a "large percentage of patients who would spit on someone trying to help them are carrying dangerous infectious diseases",
- suggested that treatment of people in detention are taking up increasing resources in EDs, and presented no evidence why policies making treatment of patients or detainees safer are mutually exclusive with policies that promote patient choice or responsibility;
- described how he makes clinical judgements about patients in police custody quickly and without sufficient information, so they can be more efficiently placed in police detention. In light of these comments, the Complainants are concerned Dr. Milburn lacks the de-escalation and interviewing skills necessary to engage with patients presenting with difficult behaviours.

The complainants did not suggest physicians cannot or should not contribute to public policy debates. They expressed that all physicians enjoy the right to freedom of expression, but that as a regulated healthcare professional, physicians are not free to say anything they want in any manner they wish. While the complainants noted that physicians should be encouraged to contribute to public policy debates, their perspectives are especially helpful when supported by peer reviewed, scientific research. The complainants did not feel that Dr. Milburn's opinions, offered without supporting evidence, upheld the reputation of the medical profession.

In his response to the Complaint, Dr. Milburn reinforced his right to freedom of expression. He noted that the reaction to his comments had been overwhelmingly positive and that his colleagues expressed relief someone was finally raising uncomfortable issues that needed to be addressed. Many of his colleagues indicated to him they felt unable to speak publicly on these issues for fear of reprisals, including losing their jobs.

Dr. Milburn indicated that as a custodian of limited resources, he needed to be concerned for all the patients under his care and to ensure the emergency department does not expend excessive resources on any one individual or group at the expense of others.

Dr. Milburn commented on the need for workplace safety for emergency department physicians and staff and noted an increased prevalence and perceived tolerance for workplace violence.

With respect to the suggestion from the complainants that he was referring to patients as "the criminal element" or "criminals", he responded that he did not refer to individuals brought into the emergency department by the police as criminals. His use of the word was meant generically to describe a group of people he interacts with in the criminal justice system and who engage in lawless and assaultive behavior in the emergency department.

In response to the complainants' concern that Dr. Milburn failed to cite evidence to support his claims that a "large percentage of patients who would spit on someone trying to help them are carrying dangerous infectious diseases", Dr. Milburn indicated there is no doubt that being spit upon, particularly where patients may be bleeding from the mouth or nose, are at higher risk for transmitting communicable diseases. He indicated he does not feel he has to be an infectious disease expert to be aware of this.

Dr. Milburn advised that he treats all his patients equally and to the best of his ability.

DECISION

Investigation Committee "C" carefully considered this complaint in the context of Dr. Milburn's response, and in the context of the recent Alberta Court of Appeal decision in *Strom v. Saskatchewan Registered Nurses Association*, 2020 SKCA 1112 ("*Strom*"). In the *Strom* case, a registered nurse had made comments on social media that were critical of healthcare provided to her grandfather in a long-term care facility. The comments became the subject of a regulatory complaint and an adverse finding was made against the nurse by her regulator. On appeal to the Saskatchewan Court of Appeal, the Court recognized that becoming a member of a regulated profession comes with benefits, but at a cost. The Court noted it was legitimate for a professional regulator to impose requirements that impact freedom of expression. However, criticism of the healthcare system, even by those delivering services, is often in the public interest. The correct approach to assessing whether speech critical of healthcare systems constitutes professional misconduct or conduct unbecoming, is to look at the context of the comments and take into account all relevant factors.

In this case, the Committee noted that it was dealing with the difficult issue of when a physician's freedom of expression may cross the line into professional misconduct or conduct unbecoming. In considering that, the Committee looked at the context of the comments.

With respect to Dr. Milburn's use of the terms "criminal" and "criminal element", the Committee accepted Dr. Milburn's explanation he was using the terms in reference to persons behaving in a criminal manner while in custody in the emergency department. The Committee noted there was

no evidence to suggest Dr. Milburn treats persons in custody any differently than any of his other patients. The Committee accepted his explanation that providing care in such circumstances can be difficult, when patients are uncooperative or violent.

While Dr. Milburn identified himself as a physician when he advanced his views, the Committee recognized that there is a role for public discourse that may involve criticism of the healthcare system.

When exercising his right to freedom of expression, the Committee noted its concern that Dr. Milburn did not first exhaust his resources as a medical professional and healthcare administrator to address his concerns before bringing them to the public in unregulated debate. However, the Committee recognized that timeliness and practicalities can impede this approach. As a professional, Dr. Milburn has a responsibility to address perceived problems in the healthcare system in a professional manner. While the Committee believed Dr. Milburn could have attempted to further engage the health authority and other organizations to work together to address the issues he identified before bringing the matters into the public realm, the Committee was not satisfied that failure to do so constituted professional misconduct or conduct unbecoming in the context of the totality of Dr. Milburn's comments.

When considering the entirety of Dr. Milburn's comments and the context for those comments, the Committee concluded that the comments did not bring discredit upon the medical profession. As a result, the Committee did not find that Dr. Milburn engaged in professional misconduct, or that his comments amounted to conduct unbecoming a physician.

The Committee did however, state the following:

The Committee thinks it is generally advisable where practical to air concerns of this nature within the healthcare system prior to taking them public. In addition, the Committee found that some of Dr. Milburn's statements were generalizations based on negative stereotypes that could be interpreted as stigmatizing to segments of the population.

As a result, it provided advice to Dr. Milburn to use available resources within the healthcare system to air his concerns prior to "going public". The Committee further advised Dr. Milburn to be careful when making generalizations in public statements. He should always be aware that as a physician, his statements are given particular credibility by members of the public.

The Committee concluded by stating that a dismissal of the complaint should not be read as the Committee's endorsement of Dr. Milburn's public utterances. The Committee stated:

The complainants who brought this matter to the attention of the College did so in good faith, with sincere concern about the stigmatization that can result from such utterances. Individuals who identify themselves as physicians when speaking out on matters in a public way, must recognize the impact of the words and take into account the various sensitivities at play in the matters under discussion.

In this case, after interviewing Dr. Milburn and hearing his explanation of his public comments, the Committee came to accept that his words were intended as fair comment, based on his lived experience. Dr. Milburn has a right to such fair comment in these circumstances, but in exercising it, he should understand how his words may be heard by others who do not have the benefit of the detailed explanations he provided to the Committee.

As the law continues to develop in terms of when the right to freedom of expression crosses the line into a professional regulatory offence, it will be important for physicians to recognize that the right is not an unbridled one. It will also be important for the College to revisit its policies to ensure that it is providing as clear guidance as possible to assist physicians in understanding when that line may be crossed.

While dismissing the complaint, the Complaints Committee further suggested this was an appropriate case for the Registrar to exercise his statutory discretion to publish a summary of the Decision on the College's website. The Committee stated:

Given the public nature of Dr. Milburn's comments, and the recent court ruling respecting the balancing of freedom of expression on the one hand, and the need to preserve the integrity of the medical profession on the other, it will be helpful for the public to be aware of this outcome, and for physicians to be alert to the need for appropriate balancing of these interests.