

NOTICE OF PUBLICATION BAN

In the College of Physicians and Surgeons of Ontario and Dr. Johnston, this is notice that the Discipline Committee ordered that no person shall publish or broadcast the names or any information that could identify the children/victims disclosed in the material filed at the hearing under subsection 45(3) of the *Health Professions Procedural Code* (the Code), which is Schedule 2 to the *Regulated Health Professions Act, 1991*.

Subsection 93(1) of the Code, which is concerned with failure to comply with these orders, reads:

Every person who contravenes an order made under ... section 45 ... is guilty of an offence and on conviction is liable,

(a) in the case of an individual to a fine of not more than \$25,000 for a first offence and not more than \$50,000 for a second or subsequent offence; or

(b) in the case of a corporation to a fine of not more than \$50,000 for a first offence and not more than \$200,000 for a second or subsequent offence.

Indexed as: Ontario (College of Physicians and Surgeons of Ontario) v. Johnston, 2016 ONCPSD 45

**THE DISCIPLINE COMMITTEE OF THE COLLEGE
OF PHYSICIANS AND SURGEONS OF ONTARIO**

IN THE MATTER OF a Hearing directed by the Inquiries, Complaints and Reports Committee of the
College of Physicians and Surgeons of Ontario pursuant to Section 26(1) of the **Health Professions
Procedural Code** being Schedule 2 of the *Regulated Health Professions Act, 1991*, S.O. 1991, c. 18, as
amended.

B E T W E E N:

THE COLLEGE OF PHYSICIANS AND SURGEONS OF ONTARIO

- and -

DR. KEVIN JOHNSTON

PANEL MEMBERS:

**DR. J. WATTS (CHAIR)
MR. S. BERI
DR. M. GABEL
MS. D. DOHERTY
DR. C. CLAPPERTON**

**COUNSEL FOR THE COLLEGE OF PHYSICIANS AND SURGEONS OF
ONTARIO:**

MS. M. KELLYTHORNE

COUNSEL FOR DR. JOHNSTON:

**MS. J. STEPHENSON
MR. J. KATZ**

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MR. R. COSMAN

PUBLICATION BAN

Hearing Date: October 31, 2016

Decision Date: October 31, 2016

Release of Written Reasons: December 14, 2016

DECISION AND REASONS FOR DECISION

The Discipline Committee (the “Committee”) of the College of Physicians and Surgeons of Ontario heard this matter at Toronto on October 31, 2016. At the conclusion of the hearing, the Committee delivered a written order stating its finding that Dr. Kevin Johnston committed an act of professional misconduct and set out its penalty and costs order, with written reasons to follow.

THE ALLEGATIONS

The Notice of Hearing alleged that Dr. Johnston committed an act of professional misconduct:

1. under paragraph 1(1)34 of Ontario Regulation 856/93, made under the *Medicine Act, 1991* (“O. Reg. 856/93”), in that he has engaged in conduct unbecoming a physician; and
2. under paragraph 1(1)33 of O. Reg. 856/93, in that he has engaged in an act or omission relevant to the practice of medicine that, having regard to all the circumstances, would reasonably be regarded by members as disgraceful, dishonourable or unprofessional.

RESPONSE TO THE ALLEGATIONS

Dr. Johnston entered a plea of no contest to the first allegation in the Notice of Hearing, that he has engaged in conduct unbecoming a physician. The College withdrew the second allegation in the Notice of Hearing.

THE FACTS

The following facts were set out in a Statement of Uncontested Facts which was filed as an exhibit and presented to the Committee:

PART I - FACTS

Background

1. Dr. Kevin Johnston (“Dr. Johnston”) is a 44 year old family physician who received his certificate of registration authorizing independent practice from The College of Physicians and Surgeons of Ontario (the “College”) on June 9, 1999.
2. Dr. Johnston has previously practised in Toronto, Cambridge, St. Catharines, and Mississauga, Ontario. Most recently, in 2015 and 2016 he practised in Guelph and Kitchener, Ontario. Dr. Johnston has not practised medicine since March 17, 2016.
3. Dr. Johnston’s former name was Kevin Richard Speight, under which he practised medicine until November 18, 2014.

Accessing, Purchasing, and Possessing Child Pornography

4. In October 2010, Dr. Johnston accessed the Internet and visited a website, Azov Films, which sold movies and photo collections, including child pornography. Dr. Johnston accessed and purchased child pornography depicting nude pubescent and pre-pubescent boys. Specifically,
 - Before making his purchases, Dr. Johnston accessed child pornography on the Azov Films website, including flash video files and compressed container files with various movie trailers and JPEG images.
 - On October 16 and 17, 2010, Dr. Johnston purchased sixteen discs containing collections of photos (the “photo discs”) from Azov Films. Fourteen of the photo discs contain child pornography.
 - On October 16, 17, and 18, 2010, Dr. Johnston downloaded the photo discs described above to a computer in his home.

5. Attached at Tab 1 of the Statement of Uncontested Facts is a report by Detective Constable Matt Ross of the Toronto Police Service, which was prepared at the College's request and received in December 2014. Detective Ross was present at the execution of a search warrant at a Toronto address relating to the Azov Films website. He engaged in a forensic analysis of the Azov Films computer server, including data relating to its e-commerce application. In his report, Detective Ross identifies orders that Dr. Johnston placed on the website to purchase photo collections and Dr. Johnston's downloads of the photo collections that he purchased. Dr. Johnston's purchases were also confirmed by Dr. Johnston's credit card statement, obtained by the College.
6. Dr. Johnston was acquitted of criminal charges in relation to the purchases described above on May 29, 2013. The Court found that the Crown had not led any evidence of an essential element of the offence, namely that Dr. Johnston knew the nature and content of the images that he ordered. The College requested a further report from the Toronto Police Service addressing this issue. Attached at Tab 2 of the Statement of Uncontested Facts is a further report regarding the analysis conducted by Detective Matt Ross and Detective Amy Davey of the Toronto Police Service, received in August 2015. The report confirms that Dr. Johnston was aware of the nature and content of the child pornography that he purchased, and in particular that he had accessed various movie trailers and images containing child pornography before he purchased photo collections.

Surreptitious Video Recording

7. During the execution of a search warrant at Dr. Johnston's residence on November 24, 2011, Toronto police seized an "Angel Eye" mini video recording system, a micro SD card, and an Apple iPhone. The video recording system was equipped with a small camera attached by a cord and an empty slot capable of housing a micro SD card.
8. The mini SD card contained four videos date stamped 2007.08.26. Two of the videos contained images of Dr. Johnston, his cat, and his residence. The other two

videos contained footage from a public bathroom. In particular, there was footage which Dr. Johnston had surreptitiously filmed of an unknown male defecating in a bathroom stall. On the Apple iPhone, other videos and images were taken in public washrooms as well, including a surreptitious video which Dr. Johnston had made of a male urinating into a public urinal, made through a peep hole.

9. While Dr. Johnston was acquitted criminally of voyeurism charges in relation to the above conduct, he does not contest the facts above.

PART II – NO CONTEST

10. Dr. Johnston does not contest the facts in paragraphs 1 to 9 above, nor that these facts constitute professional misconduct under paragraph 1(1)34 of Ontario Regulation 856/93, made under the *Medicine Act, 1991*, S.O. 1991, c. 30, in that he has engaged in conduct unbecoming a physician.

FINDING

The Committee accepted as correct all of the facts set out in the Statement of Uncontested Facts. Having regard to these facts, the Committee found that Dr. Johnston engaged in professional misconduct, in that he engaged in conduct unbecoming a physician.

PENALTY AND REASONS FOR PENALTY

The following additional facts were set out in an Agreed Statement of Facts Regarding Penalty which was filed as an exhibit and presented to the Committee:

1. The child pornography in issue in this case did not contain explicit sexual activity or violence.
2. In 2012, after the events in issue, Dr. Kevin Johnston (“Dr. Johnston”) was diagnosed with bipolar disorder.

3. After Dr. Johnston was charged criminally, he entered into a recognizance of bail on November 25, 2011 in the criminal process. Among other things, it restricted Dr. Johnston from being alone with anyone under 18 years of age, including while he practiced as a physician. His bail was varied on February 16, 2012 and March 1, 2012.
4. After the College was made aware of the charges against Dr. Johnston, an investigator was appointed pursuant to section 75(1)(a) of the Health Professions Procedural Code on March 20, 2012. At the College's request, Dr. Johnston voluntarily entered into an undertaking on November 5, 2012 that mirrored the terms of his criminal recognizance, so that the College could monitor Dr. Johnston's compliance. This undertaking remained in effect after Dr. Johnston's criminal process came to an end.
5. After allegations against Dr. Johnston were referred to the Discipline Committee, the Inquiries, Complaints and Reports Committee of the College provided Dr. Johnston with notice that it intended to impose an interim order against him pending resolution of the discipline allegations. In response, Dr. Johnston entered into a new voluntary undertaking (replacing the 2012 undertaking) dated March 17, 2016. Among other things, it required him to have a College-approved practice monitor for all professional encounters with patients under the age of 18, until the allegations against him were resolved. Subsequently, Dr. Johnston chose to cease practising medicine until the hearing.

Counsel for the College and counsel for the member made a joint submission as to an appropriate penalty and costs order. The proposed order called for the revocation of Dr. Johnson's certificate of registration, a reprimand, and the payment of costs.

The Committee is well-aware of the principle that it should not depart from a joint submissions on penalty unless the proposed penalty would bring the administration of justice into disrepute or is otherwise contrary to the public interest.

The Committee considered the proposed penalty in light of accepted penalty principles. These include, foremost, the protection of the public. As well, an important principle is the maintenance of public confidence in the integrity and reputation of the medical profession and its ability to self-regulate in the public interest.

The Committee is aware that it can be guided by previous decisions based on the principle that like decisions should attract like penalties, but that each penalty will be based on the unique facts of each case. No case was presented to the Committee that fully resembles Dr. Johnston's case. This is the first case to be heard by the College's Discipline Committee that entails the viewing, purchasing, and possession of pornographic images of young children. While the images do not, as noted in the Agreed Statement of Facts, reach levels of violence and intrusion that are known to exist, the purchase and possession of such images demean the participants who are below the age of consent, and encourage and allow the continuing exploitation of children.

The Committee was of the opinion that Dr. Johnston's involvement with child pornography represents one of the most serious forms of misconduct possible by a physician, and is deserving of the most serious sanction. While the legal definition of sexual abuse does not include possessing and viewing child pornography, the Committee finds that it is conduct of a sexual nature with the potential to demean and traumatize young persons. Purchasing, viewing and possessing child pornography by a physician cannot be countenanced. Neither can voyeurism, by placing cameras in a public bathroom, for its deliberate, secretive, devious, intrusive, and demeaning ways. There is an expectation of moral behaviour by persons granted the privilege to practise medicine. Dr. Johnston engagement in the consumption of child pornography and voyeurism has demonstrated conduct that is totally unbecoming of a physician.

The Committee agrees with the panel of the Discipline Committee in *CPSO v. Gillen*, where the Committee stated:

Public confidence is essential. In *Adams v. The Law Society of Alberta*, 2000 ABCA 240 (CanLII), [2000] 11 W.W.R. 280, at page 3, the Alberta Court of

Appeal highlights the weight of what the College must do: “This public dimension is of critical significance to the mandate of professional disciplinary bodies.” With the monopolistic right of self-regulation, the College bears an extraordinary responsibility. The government and the public properly expect that the College will fulfill its role in self-regulations including having due regard for the public confidence in how it goes about doing so.

The Committee also agrees with what was stated in *The Law Society of Upper Canada v. Agnew Johnston*:

Clients need to be able to trust their lawyers, both as individuals and as members of the legal profession. And young persons need to be able to trust adults and those in positions of trust. The actions and misconduct of this lawyer strike so strongly to the quick of the essence of the legal profession that no other penalty is appropriate nor available. A suspension, even a lengthy suspension, is an inappropriate and inadequate response to this misconduct. A suspension reflects neither the gravity of this misconduct nor the Law Society’s rejection of the misconduct as behaviour suitable for lawyers. The public would not understand a suspension as a suitable response from the Law Society to this misconduct. The lawyer must be disbarred.

As clients need to be able to trust their lawyers, patients need to be able to trust their doctors. It is the role of the Committee to consider an appropriate penalty that maintains public confidence in the profession and the College’s ability to govern the profession in the public interest and to protect the public. Therefore, the Committee must ensure that physicians who act in a manner that is contrary to public trust and public safety are held to account.

The Committee was presented with certain mitigating factors. A no contest plea spared witnesses from having to testify and the Committee the time and expense of conducting a lengthy contested hearing. Since 2011, Dr. Johnston has been practising under restrictions imposed by the courts and by voluntarily entering into an undertaking in 2012 with the

College that mirrored the terms of his criminal recognizance. After the referral of the allegations against him to the Discipline Committee in 2016, he entered into a new voluntary undertaking with the College to restrict his practice. Subsequently, he chose to cease practising until the hearing. There had been ongoing cooperation by Dr. Johnston with the College. However, none of these factors were meaningful in assessing the proposed penalty because they do not speak to the danger that child pornography poses to children.

As a further mitigating factor, counsel for Dr. Johnston raised the issue of his recent bipolar diagnosis. The Committee was presented with no evidence regarding the basis for diagnosis, or that Dr. Johnston's conduct was in any way the result of this medical condition.

Aggravating factors included Dr. Johnston's part in encouraging the commercialization and availability of child abuse pornography, and victimization of the affected children, as well as the moral reprehensibility of this type of pornography.

Child pornography is not a victimless activity. The children portrayed and directed to perform actions are being traumatized and victimized. There is no question in the Committee's mind on examining the police reports that Dr. Johnston was fully aware of the nature of the images he downloaded. Because of the nature of the internet site he accessed (dynamic as opposed to static content), it is not possible to determine the specific pornographic material Dr. Johnston observed at the time he was doing so, or the level of degradation or exploitation displayed in the material. What was known was that the material available on the site and in Dr. Johnston's possession was child pornography that Dr. Johnston accessed and purchased.

Furthermore, Dr. Johnston's placement of cameras in public washrooms was obviously planned and thought out and was an egregious invasion of the privacy of unsuspecting individuals. It speaks to a high level of voyeurism and reckless behaviour. Can Dr. Johnston be trusted in any circumstance where there is the possibility of easy access to

children and opportunity for voyeuristic actions? The Committee strongly concludes that such trust cannot be assured.

Physicians, by the very nature of the practice of medicine, have access to their patients' most private selves and concerns. Physicians observe patients in disrobed states as part of physical examinations and examine body areas of great sensitivity, privacy, and vulnerability. Young children and adolescents are part of a family physician's practice. Members of the public expect to be able to trust their physicians to utilize their position, knowledge and skills for their patients' benefit in a respectful and non-prurient way. Dr. Johnston's misconduct does not engender trust or confidence that he would examine his patients in a manner appropriate to the medical issue at hand. The Committee cannot allow the public to be exposed to the risk posed by interactions with a physician who may act to satisfy his non-professional needs and desires. Dr. Johnston cannot be allowed to practise when there is no evidence to support confidently that he has confronted and addressed the psychological factors leading to his behavior, which has been found to constitute professional misconduct.

The Committee is aware that in this case, Dr. Johnston is permitted by statute to apply for reinstatement of his certificate registration one year following revocation. While a panel of the Committee hearing an application for reinstatement makes its own determination of the physician's suitability to return to practice, this panel emphasizes in relation to any future reinstatement hearing, the severe moral turpitude of Dr. Johnston's misconduct, and also that this panel heard of no steps being taken to possibly effect change in him.

In this case involving intentional misconduct, it is appropriate that there be an award of costs against the physician on the tariff basis for a one day hearing, as jointly proposed by the parties.

ORDER

The Committee stated its finding in paragraph 1 of its written order of October 31, 2016. In that order, the Committee ordered and directed on the matter of penalty and costs that:

2. The Registrar revoke Dr. Johnston's certificate of registration, effective immediately.
3. Dr. Johnston appear before the panel to be reprimanded.
4. Dr. Johnston pay costs to the College in the amount of \$5,000.00 within thirty (30) days of the date of this Order.

At the conclusion of the hearing, Dr. Johnston waived his right to an appeal under subsection 70(1) of the Code and the Committee administered the public reprimand.