

ONTARIO COURT OF JUSTICE

B E T W E E N :

HER MAJESTY THE QUEEN

— AND —

IRINA CHERNYAKHOVSKY

Before Justice Charles H. Vaillancourt
Heard on June 15, December 7, and December 11, 2017
Reasons for Judgment released on January 26, 2018

I. Sunderland and K. Hebert..... counsel for the Crown
M. Macchia counsel for the accused Irina Chernyakhovsky

VAILLANCOURT J.:

[1] The accused entered a guilty plea to the charge that between the 1st day of March in the year 2015 and the 30th day of September in the year 2015 at the City of Toronto in the Toronto Region she did, by deceit, falsehood or other fraudulent means, defraud [REDACTED] Dentistry Professional Corporation of monies of a value exceeding five thousand dollars, contrary to Section 380, subsection (1), clause (a) of the *Criminal Code of Canada*.

[2] The Crown proceeded by way of indictment.

THE FACTS

[3] Ms. Chernyakhovsky was employed at the dental office of Dr. [REDACTED] from March 1, 2015 to the fall of 2015. During that time she enriched herself through fraudulent transactions and casino cash advances in the amount of \$63,000.00.

[4] Ms. Chernyakhovsky advised Dr. Gojer that in March 2015 her dog, who she was very attached to, became ill and that she was very stressed about it. She also advised Dr. Gojer that her father was ill in October of 2014. She was stressed dealing with his illness. She said that she became very depressed from March 2015 and when she ran out of money to

care for her dog and the dog's chemotherapy, she committed the frauds at Dr. [REDACTED]'s office. Ms. Chernyakhovsky said that she used her daughter's bank account for this fraud. She said that she used very poor judgment at the time, which was at a time when she was very depressed and all that she was thinking of was to fix the things going wrong in her life.

[5] The Crown filed a chart (Exhibit #1) that demonstrated the pattern of Ms. Chernyakhovsky's withdrawals. It is clear that Ms. Chernyakhovsky embarked upon her fraudulent activities almost from the first day of her employment and continued her illegal activities regularly thereafter escalating the dollar amounts as time went by.

CROWN'S POSITION ON SENTENCING

[6] Assistant Crown Attorney, Ms. Hebert, advocated for a custodial sentence of four years.

[7] Ms. Macchia submitted that the appropriate sentence to be imposed was a conditional sentence of eighteen months and three years of probation.

VICTIM IMPACT STATEMENT

[8] Dr. [REDACTED] read his victim impact statement into the record. A hard copy of that statement was filed as Exhibit 2.

[9] Dr. [REDACTED] has been a dentist for [REDACTED] years and has been very active in various professional organizations throughout his career and has recently been presented with an Award [REDACTED] Ontario Dental Association for his many hours of volunteer service in connection with organized dentistry.

[10] Dr. [REDACTED] is not only a victim of Ms. Chernyakhovsky's fraudulent conduct in a financial sense but he has had to deal with a significant amount of collateral damage as a result of Ms. Chernyakhovsky's actions that she took as a result of her employment termination.

[11] At the time of her firing, Ms. Chernyakhovsky advised Dr. [REDACTED] that if he did not withdraw the charges against her he would be very sorry. This was not an idle threat. Ms. Chernyakhovsky mounted a deliberate campaign of intimidation, harassment and revenge against Dr. [REDACTED] that included:

- Convincing two of Dr. [REDACTED]'s support staff that she had done nothing wrong and that it was Dr. [REDACTED] who was actually stealing from his patients. As a result, these two individuals quit and Dr. [REDACTED] was required to find replacements.
- Calling the Ministry of Labour and reporting that Dr. [REDACTED]'s office had unsafe working conditions.
- Notifying the Department of Health and advising them that Dr. [REDACTED] did

not sterilize his instruments and that there was mould and mouse droppings in his office.

- Contacting the Royal College of Dental Surgeons of Ontario and claiming that Dr. [REDACTED] abused [REDACTED], made false claims to [REDACTED], charged for services that he had not performed, overcharged his patients, and did not properly sterilize his instruments.

[12] The aforementioned actions of Ms. Chernyakhovsky resulted in investigations that required Dr. [REDACTED] to defend and to explain himself to the various investigative bodies and various insurance companies.

[13] The onslaught of Ms. Chernyakhovsky's endeavours required a significant amount of time and expense on Dr. [REDACTED]'s part.

[14] It should come as no surprise that the entire Chernyakhovsky affair caused Dr. [REDACTED] a great deal of emotional strain and it has impacted negatively on his interactions with his wife, children and grandchildren.

[15] Dr. [REDACTED] has experienced dismay over the apparent lack of support from his colleagues and professional organizations that he had worked with throughout his career.

[16] Dr. [REDACTED] has also been the focus of negative social media commentary. Whether this activity was generated by the accused directly is of little weight. Such notoriety is but another distraction that Dr. [REDACTED] has had to deal with as a result of Ms. Chernyakhovsky's actions.

[17] In addition to the financial and emotional stressors, Dr. [REDACTED] has experienced [REDACTED] that has required him to attend physiotherapy for three months. He also has had difficulty sleeping and has suffered from [REDACTED].

AGGRAVATING CIRCUMSTANCES

[18] The fact that we are dealing with a significant breach of trust is most concerning to the court.

[19] The fact that Ms. Chernyakhovsky began draining money almost from day one of her employment with Dr. [REDACTED] compounds the seriousness of the breach of trust.

[20] Ms. Chernyakhovsky's criminal record is troubling in the extreme. The record covers a significant timeframe and has related offences on it including breach of trust counts involving dentist offices. The rapidity that Ms. Chernyakhovsky commenced her withdrawal schemes might very well be explained when one considers that this conduct has been perfected over the years.

[21] The criminal record indicates the following entries:

1987-03-14	Theft Under \$1000.00 (2 charges)	Suspended sentence & probation for 1 year on each charge
2005-08-22	Fraud Under \$5000.00	Suspended sentence – two years probation and 28 days presentence custody
2005-12-05	(1) Use of Credit Card (2 charges) (2) Use of credit card (3) Personation with intent (4) Fraud under \$5000	(1) 60 days conditional sentence order & (1 day pre-sentence custody) (2-4) 60 days conditional sentence order on each charge consecutive and concurrent
2008-03-11	(1) Fraud Over \$5000.00 (2) Fail to comply Recognizance (3) Fail to comply Recognizance	(1) Six months and two months presentence custody (2) 2 months concurrent (3) 1 month concurrent
2008-05-12		Paroled
2009-03-26	(1) Fraud over \$5000 (2) Fraud over \$5000 (5 charges) (3) Uttering forged document (4) Fail to Comply Recognizance	(1-3) 2 years on each charge concurrent and 6 days pre-sentence custody (4) 3 months current and consecutive and probation 3 years
2009-11-24		Paroled
2010-03-22	(1) Forgery (2) Fraud Over \$5000	(1-2) 6 months on each charge concurrent and concurrent with unexpired portion of sentence
2010-06-29	Parole Violator	Recommitted
2017-03-17	(1) Uttered forged document under	(1) Conditional sentence –

	\$5000	2 years less one day
	(2) Possession of property / proceeds of crime under \$5000	(2) Conditional sentence- 2 years less one day con current
	(3) Fail to comply recognizance	(3) Fine \$100.00

[22] The criminal record of the accused suggests that she is a high risk to reoffend.

[23] The actions taken by the accused against Dr. [REDACTED] after her dismissal are referenced in the Victim Impact Statement and certainly demonstrate a degree of vindictiveness on the part of Ms. Chernyakhovsky.

[24] Dr. Gojer's medical report dated September 9, 2017 at page five indicates that when Ms. Chernyakhovsky applied for a position with Dr. [REDACTED] she used her maiden name, Fooks, in order to avoid detection as she had a prior criminal record. This deliberate massaging of her application speaks to the criminal intent of the accused. It is interesting to observe that Ms. Chernyakhovsky considered that the fact that she was not asked if she had any prior criminal record was somehow noteworthy. I find that this point really is of no moment in the overall scheme of things.

MITIGATING FACTORS

[25] A number of the mitigating factors brought forward in counsel's submissions are somewhat diminished because of counterbalancing issues.

[26] A key mitigating factor in the accused's favour is her plea of guilty. This plea undoubtedly saved considerable court time and resources and has relieved Dr. [REDACTED] the further inconvenience of testifying.

[27] At the time of the registration of the conviction, I made a free standing restitution order in the amount of \$63,000.00. Ms. Macchia advised the court that she was in funds to pay \$10,000.00. However, when Ms. Macchia attended at the administrative office to make the payment, she was advised that the office was unable to accept the money until the sentencing process was completed in its entirety. This position seems somewhat odd to me but bureaucracy is what it is. In the fullness of time, it will be interesting to see if the \$10,000.00 is eventually paid. The Crown suggested that the accused was "trying to buy a conditional sentence". I reject this proposition. As of the time of the imposition of the restitution order, there was a genuine desire and effort to pay partial restitution. I find that in cases of fraud, payment of part or all of the restitution is a mitigating circumstance. In *R. v. Stewart*, [2014] O.J. No. 5661 and *R. v. Lord*, [2012] O.J. No. 4559, the Ontario Court of Appeal addresses the importance of restitution in the overall scheme of arriving at an appro-

priate sentence.

[28] Ms. Chernyakhovsky has been diagnosed with Major Depressive Disorder with psychotic features. She has been examined and assessed by Dr. Mary Preisman at Mount Sinai Hospital, Dr. Julian Gojer and Shawnette Thompson, MSW, RSW at the Manasa Clinic and most recently has been counselled by Dr. Mark Halman. (See Exhibit 6)

[29] Dr. Gojer noted under the heading, Mental State Examination, that:

“Ms. Chernyakhovsky presented as a very distraught woman who was weepy and agitated during the interviews I had with her. She spoke relevantly and coherently but was long winded, circumstantial and at times tangential. Her mood was significantly depressed. There were no delusions, bizarre ideas, or thought disorder. She reported auditory hallucinations which seemed to be in keeping with her depressed mood. There were no obvious cognitive deficits other than a poor attention span.

[30] Under the heading, Diagnosis, Dr. Gojer stated that:

“Ms. Chernyakhovsky is suffering from a Major Depressive Disorder.

This is a depressive illness that is of a significant nature and appears to have been going on for some time. There are indications that her depression is of psychotic intensity. She also has problems with her personality which appears to be marked by low self-esteem, a need to please others and to seek out approval from family and people around her.

There is no indication that she has a substance use disorder, a gambling problem, and psychopathic or antisocial traits. Her history as outlined from her mother does not indicate that she had a conduct disorder in her childhood, nor is there a criminal history prior to 2006. It is likely that the fraud and deceitful behaviours that she has demonstrated since 2006 are a product of her life deteriorating and her suffering from problems of depression. She had not learned to cope with stress and anxiety in a mature and pro-social manner. She has used very poor judgement, albeit influenced by the presence of a depressive illness that has fluctuated over the years.

Ms. Chernyakhovsky's depressive illness does not appear to have negated her criminal responsibility. Her depressive illness and somewhat flawed personality attributes, secondary to an unhappy childhood, appear to have left her with limited coping skills and insight in how to deal with stress.

Since about a year, for the first time in her life, [she] is receiving formal and appropriate psychotherapy. She appears to have a good therapeutic relationship with her treating psychiatrist and is on appropriate medical treatment.

Ms. Chernyakhovsky is taking Cymbalta, an antidepressant drug, and is getting some relief from it. She has found the therapy sessions very helpful. She has been

able to recognize that she has been a people's pleaser, that she is not assertive, and that she has not had much self-esteem. She sees Dr. Halman once every two or three weeks.

Ms. Chernyakhovsky's prognosis is guarded in that she is still depressed and has more work to do in psychotherapy. She is, however, focused on doing well, not reoffending and is actively engaged in treatment.

Her future can be managed by ensuring that she continues in therapy and does not work for a third party in a capacity where she handles finances. Her progress in the community can be supervised by a probation or parole officer. It is unlikely that punishing her with incarceration will alter her depression. It will likely make it worse. The focus will be to ensure that she has intensive counselling and community monitoring.

[31] The Crown stressed that Ms. Chernyakhovsky might have not been completely forthright with Dr. Gojer. At page six of his report, Dr. Gojer seems to have a reduced picture of Ms. Chernyakhovsky's criminal conduct as it relates to her previous fraudulent activity. I find that this situation does not have any impact of the medical opinions expressed but there is a concern regarding Ms. Chernyakhovsky's veracity.

[32] It is interesting that Ms. Chernyakhovsky has been described as not being assertive. Her actions towards Dr. [REDACTED] after she had her employment terminated do seem to suggest a very assertive personality.

[33] Ms. Chernyakhovsky has tearfully expressed her remorse to the court regarding her criminality. However, this stated remorse is not supported by the actions that she has taken against Dr. [REDACTED] subsequent to her dismissal and the laying of criminal charges. I find that the expressed remorse is focused on the accused's personal circumstances as opposed to any meaningful regret that her actions have had on the complainant or society at large.

[34] Ms. Macchia noted in her submissions that Ms. Chernyakhovsky still has work to do in the realm of remorse. I agree.

[35] Ms. Chernyakhovsky has support in the community as evidenced by the letters filed in this sentencing hearing. Both the accused's mother and ex-mother-in-law have stepped forward to provide moral support for her.

[36] Ms. Chernyakhovsky has recently become a grandmother and has expressed a desire to become involved in the child's life.

THE LAW

[37] The Ontario Court of Appeal in *R. v. McEachern*, [1978] O.J. No. 987 sets out the basic principle in breach of trust cases as follows:

[8] ... It has long been established that the most important principle in sentencing a

person who holds a position of trust is that of general deterrence. The offences were serious and involved a large sum of money. They were concealed by the respondent until they were detected by the bank.

[9] In our opinion the gravity of the offences called for the imposition of a custodial term, and there are no exceptional circumstances which would justify a lesser punishment. The trial judge placed too much emphasis on restitution, and on community service as an alternative to imprisonment, and did not attach sufficient importance to general deterrence. The public interest requires that it be made very clear to one and all that in the absence of exceptional circumstances a person holding a position of trust who steals from his employer must expect a term of imprisonment.

SENTENCE

[38] The circumstances of this case are such that there are no exceptional circumstances that would warrant a non-custodial sentence.

[39] Ms. Chernyakhovsky has been involved in fraudulent criminal activity over the years and has received significant periods of jail for her conduct. In the case at bar, she used her prior acquired skills working in dental offices to drain funds from Dr. [REDACTED]'s dental practice. She started her activities early on and continued them until she was terminated from her employment. Thereafter, she made a concerted effort to make Dr. [REDACTED] life difficult by making formal and unfounded complaints to various agencies requiring Dr. [REDACTED] to expend significant time and resources to regain some degree of equilibrium.

[40] The amount of the financial loss herein can be described as significant.

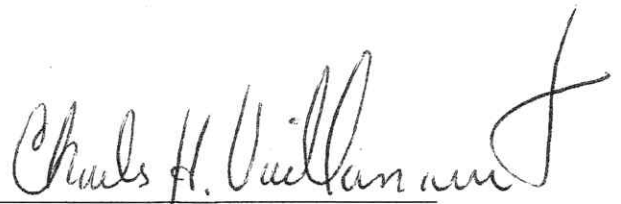
[41] I do not find the mitigating circumstances as outlined in these reasons to be particularly compelling and in no way can be categorized as exceptional circumstances.

[42] I am prepared to give maximum weight to Ms. Chernyakhovsky's plea of guilt and her belated efforts to seek out professional help to deal with her Major Depressive Disorder. I am also taking into account the fact that Ms. Chernyakhovsky's willing to make partial restitution at the outset of the sentencing process.

[43] I view any expressions of remorse on the accused's behalf to be self-serving and not particularly sincere.

[44] I find that the breach of trust in this case requires a custodial sentence of three years.

Dated: January 26, 2018



Justice Charles H. Vaillancourt