Case Name:

R. v. Pellegrini

IN THE MATTER OF the Business Practices Act, R.S.O. 1990, c. B-18
Between
Her Majesty the Queen in Right of Ontario as represented by the Ministry of Consumer and Business Services, prosecutor, and
Rieso Giacomo Pellegrini also known as Jim Pellegrini, holding himself out as St. James International Academy, defendant

[2006] O.J. No. 3369

2006 ONCJ 297

70 W.C.B. (2d) 551

Ontario Court of Justice

R. Quon J.P.

Heard: November 28, 2005.
Judgment: August 22, 2006.

(75 paras.)

Criminal law -- Regulatory offences -- Offender convicted for seven counts under Business Practices Act -- Recruited special needs students to school using misrepresentations and failed to refund monies as promised -- Given criminal nature of offence, appropriate sanction was imprisonment plus a ***probation*** *order that included a restitution condition --* ***Provincial Offences*** *Act, R.S.O. 1990, c. P-33.*

Commercial law -- Trade regulation -- Offences and penalties -- Offender convicted for seven counts under Business Practices Act -- Recruited special needs students to school using misrepresentations and failed to refund monies as promised -- Given criminal nature of offence, appropriate sanction was imprisonment plus a ***probation*** *order that included a restitution condition -- Business Practices Act, R.S.O. 1990, c. B-18.*

Pellegrini owned and operated a private school -- He represented that his school provided specialized programs and a low teacher to student ratio -- He did not inform the parents that the school was not properly authorized to issue high school credits -- Further, he falsely promised parents that he would refund tuition -- The total financial loss to the parents was $76,110 -- Also, most of the children lost an academic year or had to retake their courses -- Pellegrini was convicted for seven counts of engaging in an unfair practice by knowingly making false, misleading, deceptive or unconscionable consumer representations to consumers contrary to ss. 2 and 3 of the Business Practices Act -- He had a criminal record for fraud over $5,000 -- HELD: Pellegrini sentenced to 90 days' imprisonment on each count to be served concurrently -- Also sentenced to two years' **probation** on two of the counts, with conditions including full restitution to two families -- This was the least restrictive sanction that would achieve deterrence, denunciation and promote a sense of responsibility in Pellegrini -- He had not shown any remorse, had not repaid any of the funds and had a criminal record -- His conduct contained deliberate, calculated and intentional deception and caused considerable harm to vulnerable victims -- These regulatory offences were closer to a true crime -- A conditional sentence was not an available sanction under s. 2(2) of the **Provincial Offences** Act and this was not an appropriate case to impose such sentence by applying the principle of creative sentencing in the law of regulatory sentencing -- Section 72(3)(c) of the Act permitted a condition of restitution in a **probation** order -- The families who were entitled to restitution were the parent of the autistic child who paid $10,100, and whom Pellegrini promised would be paid full restitution if she change her mind in 30 days, and the child who had lost both of his parents and had paid $15,190 from his trust fund on the misrepresentation that he would obtain high school credits -- These two cases were the most serious in terms of hardship for the families and for moral blameworthiness of the offender.

Statutes, Regulations and Rules Cited:

Business Practices Act, R.S.O. 1990, c. B-18, s. 2, s. 3, s. 17(2), s. 64, s. 72, s. 73

Criminal Code, s. 718, s. 718.1, s. 718.2(b), s. 718.2(d), s. 718.2(e)

Provincial Offences Act, 1979, S.O. 1979, c. 4,

Provincial Offences Act, R.S.O. 1990, c. P-33, s. 2(1), s. 2(2), s. 72, s. 72(3), s. 72(3)(a), s. 72(3)(c)

Summary Convictions Act, R.S.O. 1970, c. 450,

Cases cited:

Ontario (Consumer and Business Services) v. St. James International Academy Ltd., [2005] O.J. No. 3420 (QL), 2005 ONCJ 369, 10 B.L.R. (4th) 96 (O.C.J.) per Quon J.P.

R. v. Bata Industries Ltd. (1995), 25 O.R. (3d) 321, [1995] O.J. No. 2691 (QL) (O.C.A.) per

Catzman, Carthy and Osborne JJ.A.

R. v. Beach Motors Inc., [2002] O.J. No. 4458 (QL) (O.C.J.) per Quon J.P.

R. v. Campbell, [2004] O.J. No. 1144 (QL) (O.C.J.) per Keast J.

R. v. Collins, [2005] O.J. No. 2823 (QL) (O.C.J.) per Lambert J.

R. v. Cotton Felts (1982), 2 C.C.C. (3d) 287, [1982] O.J. No. 178 (QL) (O.C.A.) per Martin, Zuber and Blair JJ.A.

R. v. Hutchings, [2004] O.J. No. 3950 (QL) (O.C.J.) per Kowarsky J.P.

R. v. Jamieson (1981), 64 C.C.C. (2d) 550 (O.C.A.) per MacKinnon A.C.J.O.

R. v. Kirk (No. 1), [2005] O.J. No. 3316 (QL), 2005 ONCJ 352 (O.C.J.) per Kukurin J.

R. v. Kirk (No. 2), [2006] O.J. No. 349 (QL), 2006 ONCJ 22 (O.C.J.) per Kukurin J.

R. v. Mastromonaco, [2002] O.J. No. 4612 (QL) (Sup. Ct. Jus. of Ont.) per Valin J.

R. v. Mastromonaco, [2005] O.J. No. 501 (QL) (O.C.A.) per Rosenberg, Simmons and Lang JJ.A.

R. v. M.(C.A.) (1996), 105 C.C.C. (3d) 327 (S.C.C.).

R. v. Pierce (1997), 32 O.R. (3d) 321, [1997] O.J. No. 715 (O.C.A.) per Finlayson, Abella and Goudge JJ.A.

R. v. Sawicki (2002), 225 Sask. R. 182, [2002] S.J. No. 608 (QL) (Q.B.).

R. v. Sweeney (1992), 71 C.C.C. (3d) 82, 11 C.R. (4th) 1 (B.C.C.A.)

R. v. Virk, [2002] O.J. No. 4102 (QL) (O.C.J.) per Madigan J.P.

R. v. Wells (2003), 38 M.V.R. (4th) 93, [2003] O.J. No. 2025 (QL) (O.C.J.) per Lane J.

R. v. Westfair Foods Ltd., [2005] 10 W.W.R. 752, [2005] S.J. No. 279 (QL) (Sask. Prov. Ct.) per Whelan J.

Statutes cited:

Business Practices Act, R.S.O. 1990, c. B-18, s. 17(2).

Criminal Code, R.S.C. 1985, c. C-46, ss. 718, 718.1, 718.2, 718.2(b), 718.2(d), 718.2(e).

Provincial Offences Act, R.S.O. 1990, c. P-33, ss. 2(1), 2(2), 64, 72, 72(3)(a), 72(3)(c), 73, 75, 75(d).

Provincial Offences Act, 1979, S.O. 1979, c. 4.

Summary Convictions Act, R.S.O. 1970, c. 450.

References cited:

W.D. Drinkwalter and J.D. Ewart, Ontario **Provincial Offences** Procedure (Toronto, Canada: The Carswell Company Limited, 1980).

T. Archibald, K. Jull, and K. Roach, Regulatory And Corporate Liability: From Due Diligence To Risk Management (Aurora, Ontario: Canada Law Book Inc., 2004), updated January 2005.

R. Libman, Libman on Regulatory Offences in Canada (Salt Spring Island, B.C.: Earlscourt Legal Press Inc., 2002).

S. Stewart, Stewart on **Provincial Offences** Procedure in Ontario (2 Ed.) (Toronto, Canada: Earlscourt Legal Press, Inc., 2005).

Exhibits entered:

Exhibit "1" -- four victim impact statements (from Anna M. and Angelo M., Nadine D. and Douglas D., Kadwali K., and Linda D.).

Exhibit "2" -- copy of chart prepared by Crown for monetary losses incurred by victims.

Exhibit "3" -- six reference letters in support of Pellegrini (3 signed letters from Rev. Mary E. Bowes, Rev. Robert P. Carter and Sally Persaud and 2 unsigned letters from Jane Eves, Norren Akhtar and 1 e-mail from April Cameron).

Exhibit "4" -- five page pre-sentence report dated October 13, 2005 and prepared by Jacqueline Pogue, a **probation** and parole officer with the Ministry of Community Safety and Correctional Services.

Counsel:

Stebbing J., counsel for the Ministry of Government Services (formerly Ministry of Consumer and Business Services).

Hochberg L., counsel for Rieso Giacomo Pellegrini.

Reasons for Sentence

R. QUON J.P.:--

1. INTRODUCTION

1 On August 12, 2005, after a lengthy trial that had begun on January 26, 2004, and that had involved many witnesses, I found Rieso Giacomo Pellegrini also known as Jim Pellegrini ("Pellegrini") to be guilty of committing 7 of the 10 unfair practice charges laid against him under s. 17(2) of the Business Practices Act, R.S.O. 1990, c. B-18. See my reasons in Ontario (Consumer and Business Services) v. St. James International Academy Ltd., [2005] O.J. No. 3420 (QL) (O.C.J.). Pellegrini's seven convictions were for engaging in an unfair practice by knowingly making false, misleading, deceptive or unconscionable consumer representations to consumers contrary to s. 2 and 3 of that Act. His sentencing hearing was then postponed until November 28, 2005, so that a pre-sentence report could be prepared. My judgment for sentence was then adjourned several times until it was finally scheduled to be rendered on August 22, 2006. These, therefore, are my reasons for sentence.

2 The seven convictions that were entered against Pellegrini were for committing regulatory offences of the *mens rea* type, which required the presence of some positive state of mind such as intent, knowledge or recklessness in committing the offence. Therefore, his wrongful conduct in these *mens rea* type offences, for the purposes of sentencing, are higher up on the scale of moral blameworthiness then it would have been had these regulatory offences been classified as strict liability offences, where liability is based on negligence.

3 The available penalties that can be imposed on Pellegrini for a conviction of engaging in an unfair practice is set out in s. 17(2) of the Business Practices Act:

> 17(2) Every person who engages in an unfair practice other than an unfair practice prescribed by a regulation made under clause 16(1)(c), knowing it to be an unfair practice is guilty of an offence and on conviction is liable to a fine of not more than $25,000 or to imprisonment for a term of not more than one year, or to both.

4 Ergo, Pellegrini may be sentenced under the Act's penalty section to a fine in the range of $1 to $25,000, or to imprisonment for a term not exceeding one year, or to both a fine and a custodial sentence on each conviction.

5 Based on the circumstances and nature of the offences that were committed and the age, character and background of this particular offender, the prosecution submits that a period of incarceration would not be an inappropriate sanction. Thus, it seeks a period of imprisonment in the range of one to four months for each one of the seven *mens rea* offences committed by Pellegrini that would be served consecutively to each other, so that the total period of incarceration sought for all seven sentences would be in the range of 12 months to 20.5 months. In addition to a period of incarceration, the prosecution also seeks a **probation** order for a period of two years that would include the following conditions: making restitution to the victims; being prohibited from operating a private school; being prohibited from operating or being a director of business in which money is paid upfront or in advance of any service or product being delivered or provided; reporting to a **probation** officer monthly; and not being employed where there would be contact with minors. On the other hand, the defence argues for a non-custodial sentence in the nature of or akin to a conditional sentence to be served in the community and a freestanding restitution order. The defence also submits that in order for the defendant to make restitution to the victims he would have to be out of custody so that he can continue working to earn money for that restitution.

2. BACKGROUND

6 During the time these seven offences were committed in the years 2000 and 2001, Pellegrini had been the principal and proprietor of a defunct private school that had operated in Toronto, named St. James International Academy (St. James). St. James had been in operation from 1996 to September 2001. For these seven offences of engaging in unfair practices, Pellegrini had knowingly made false, misleading, deceptive and unconscionable representations to the parents in order to entice them to enroll their children at St. James and to have them pay substantial tuition upfront. He was also the only person who had spoken or negotiated with the complaining parents about the amount of tuition and the type of programs offered at St. James.

7 In operating this private school, Pellegrini attempted to offer academic and special programs for students from kindergarten to high school. Pellegrini also tried to recruit overseas students and students with learning difficulties. Many of the children who had attended St. James had learning difficulties in the public school system and the parents of these children had hoped that the lower teacher to student ratio at St. James would allow their children to do better academically. Most of these parents had paid substantial amounts of tuition upfront so their children could attend St. James.

8 For the unfair practice charges in which he was convicted, Pellegrini had exaggerated or misled the parents about the quality of the school and the type of programs it would provide; or had failed to inform the parents of the material fact that St. James was not properly authorized by the Ministry of Education to issue high school credits; or had made promises to refund tuition that he could not or did not intend to fulfill; or misled one parent about the availability of a bursary to cover a portion of the tuition if she paid one-third of the tuition immediately upfront; or had promised to transfer tuition already paid by one parent to another private school, but had failed to so.

9 Eventually, the school's inability to issue high school credits came to light. When the parents, who enrolled their children at St. James because of Pellegrini's misrepresentations that it was able to grant high school credits, had found out that St. James could not grant such credits, they became very upset and outraged at Pellegrini because their children would not only be denied credits towards a high school diploma for their courses taken at St. James, but their children would also have to retake many of those courses or redo the academic year again.

10 In St. James's last year of operation, St. James and Pellegrini had faced financial difficulties before the school closed permanently in September 2001. Pellegrini was also declared to be a bankrupt in February 2001 after he filed an assignment in bankruptcy. He eventually became discharged as a bankrupt on December 18, 2003. Pellegrini had also remained the principal of St. James in the period that he was a bankrupt and continued to negotiate and collect substantial amounts of tuition upfront, even up to the days before St. James had permanently closed.

11 The total financial loss to the parents involved in the seven convictions in this proceeding amounted to $76,110. In addition, most of the affected students lost an academic year or had to repeat many of their courses again.

12 Since the closure of St. James, Pellegrini has not repaid or made any restitution to any of the parents who had paid tuition upfront based on his misrepresentations or whose children attended St. James believing that it had the Ministry of Education's approval to issue high school credits.

13 Pellegrini is presently 53 years old. He was born and raised in Toronto. He is also married, but has no children. He is a teacher by training. He began his teaching career as a non-academic music teacher at a high school. Eventually, through attendance at summer school he was able to obtain his teaching certificate in 1977.

14 Also, he obtained a Master of Education degree in 1993, a Bachelor of Education degree in 1992 and a Bachelor of Arts degree in 1991. He also took courses in teaching special education and taught part-time at the University of Toronto's Faculty of Education. In addition, he had been previously employed at Great Lakes College, a private school, and with the York Region Catholic School Board.

15 He is currently employed as a teacher at a career college. He teaches in the Hospitality and Travel program at Xincon Technology College of Canada. He earns about $3,000 to $4,000 a month for a nine-month contract. Also, he is employed as a Music Director at the Wexford Presbyterian Church where he directs the choir and is also the church organist. He has held this position since 2002. To supplement his income, he also teaches piano lessons and plays the organ at weddings, funerals and other functions.

16 Although Pellegrini is a teacher by profession, he would be unable to teach in the public or Catholic school system in Ontario because he has had his teaching certificate revoked by the Ontario College of Teachers for professional misconduct after a hearing held in 2001. As a result, he can only teach in private schools. The misconduct that led to his teaching certificate being revoked included a conviction on October 16, 1998, in Newmarket, Ontario for committing the criminal offence of fraud over $5,000; for being the principal of a private school while at the same time being employed as a teacher by the York Catholic District School Board; and for being involved in a scheme whereby Pellegrini had hired and paid his brother about $13,000 to prepare a curriculum for music studies without the school board's authorization and in which the money was funneled back to Pellegrini. In that criminal conviction, Pellegrini had been in charge of the production of a school musical in which he had misappropriated about $67,000 from ticket sales. He had been given a nine-month conditional sentence and ordered to make restitution of $23,154 and to perform 70 hours of community service. Pellegrini testified that he had pled guilty to the charge and had made full restitution.

3. RELEVANT SENTENCING PROVISIONS UNDER THE **PROVINCIAL OFFENCES** ACT

17 The **Provincial Offences** Act, R.S.O. 1990, c. P-33, provides general rules for sentencing offenders of regulatory offences in Ontario. Hence, for a person sentenced to multiple terms of imprisonment at the same time, the rule under s. 64 of the **Provincial Offences** Act requires that person to serve those custodial sentences consecutively unless the court orders those sentences to be served concurrently:

> 64. Where a person is subject to more than one term of imprisonment at the same time, the terms shall be served consecutively except in so far as the court has ordered a term to be served concurrently with any other term of imprisonment.

18 Although the Business Practices Act provides for a fine, a period of imprisonment or for both as a penalty, it is silent on the availability of **probation** as a sanction. Thus, in order to take advantage of such a sentencing option I must look to the sections governing **probation** orders under ss. 72 and 73 of the **Provincial Offences** Act, which provide for a term of **probation** that does not exceed two years:

> **Probation order**
>
> 72(1) Where a defendant is convicted of an offence in a proceeding commenced by information, the court may, having regard to the age, character and background of the defendant, the nature of the offence and the circumstances surrounding its commission,
>
> (a) suspend the passing of sentence and direct that the defendant comply with the conditions prescribed in a **probation** order;
> (b) in addition to fining the defendant or sentencing the defendant to imprisonment, whether in default of payment of a fine or otherwise, direct that the defendant comply with the conditions prescribed in a **probation** order; or
> (c) where it imposes a sentence of imprisonment on the

defendant, whether in default of payment of a fine or otherwise, that does not exceed ninety days, order that the sentence be served intermittently at such times as are specified in the order and direct that the defendant, at all times when he or she is not in confinement pursuant to such order, comply with the conditions prescribed in a **probation** order.

Statutory conditions of order

72(2) A **probation** order shall be deemed to contain the conditions that,

(a) the defendant not commit the same or any related or similar offence, or any offence under a statute of Canada or Ontario or any other province of Canada that is punishable by imprisonment;
(b) the defendant appear before the court as and when required; and
(c) the defendant notify the court of any change in the defendant's address.

Conditions imposed by court

72(3) In addition to the conditions set out in subsection (2), the court may prescribe as a condition in a **probation** order,

(a) that the defendant satisfy any compensation or restitution that is required or authorized by an Act;
(b) with the consent of the defendant and where the conviction is of an offence that is punishable by imprisonment, that the defendant perform a community service as set out in the order;
(c) where the conviction is of an offence punishable by imprisonment, such other conditions relating to the circumstances of the offence and of the defendant that contributed to the commission of the offence as the court considers appropriate to prevent similar unlawful conduct or to contribute to the rehabilitation of the defendant; or
(d) where considered necessary for the purpose of implementing

the conditions of the **probation** order, that the defendant report to a responsible person designated by the court and, in addition, where the circumstances warrant it, that the defendant be under the supervision of the person to whom he or she is required to report.

Form of order

72(4) A **probation** order shall be in the prescribed form and the court shall specify therein the period for which it is to remain in force, which shall not be for more than two years from the date when the order takes effect.

...

Regulations for community service orders

72(6) The Lieutenant Governor in Council may make regulations governing restitution, compensation and community service orders, including their terms and conditions.

Exception

72(7) The court shall not make a **probation** order when an individual has been convicted of an absolute liability offence, unless the order is made in addition to a sentence of imprisonment imposed under section 69 in default of payment of a fine.

When order comes into force

73(1) A **probation** order comes into force,

(a) on the date on which the order is made; or
(b) where the defendant is sentenced to imprisonment other than a sentence to be served intermittently, upon the expiration of that sentence.

Continuation in force

> 73(2) Subject to section 75, where a defendant who is bound by a **probation** order is convicted of an offence or is imprisoned in default of payment of a fine, the order continues in force except in so far as the sentence or imprisonment renders it impossible for the defendant to comply for the time being with the order.

19 In addition, s. 75(d) of the **Provincial Offences** Act permits the length of a **probation** order to be extended for up to another year if the person bound by the **probation** order is subsequently convicted of breaching that order. In other words, if a condition of making restitution in a **probation** order is not complied with then there is the possibility that the term could be extended for another year upon being convicted of breaching that **probation** order:

> **Breach of probation order**
>
> 75. Where a defendant who is bound by a **probation** order is convicted of an offence constituting a breach of condition of the order and,
>
> (a) the time within which the defendant may appeal or make a motion for leave to appeal against that conviction has expired and the defendant has not taken an appeal or made a motion for leave to appeal;
> (b) the defendant has taken an appeal or made a motion for leave to appeal against the conviction and the appeal or motion for leave has been dismissed or abandoned; or
> (c) the defendant has given written notice to the court that convicted the defendant that the defendant elects not to appeal, or where the defendant otherwise wilfully fails or refuses to comply with the order, the defendant is guilty of an offence and upon conviction the court may,
> (d) impose a fine of not more than $1,000 or imprisonment for a term of not more than thirty days, or both, and in lieu of or in addition to the penalty, continue the **probation** order with such changes or additions and for such extended term, not exceeding an additional year, as the court considers reasonable; or
> (e) where the justice presiding is the justice who made the original order, in lieu of imposing the penalty under clause (d), revoke the **probation** order and impose the sentence the passing of which was suspended upon the making of the **probation** order.

4. ANALYSIS

20 My sentencing options under s. 17(2) of the Business Practices Act and s. 72 of the **Provincial Offences** Act for each conviction in this particular proceeding may be summarized as the following:

(i) sentencing Pellegrini to a fine,
(ii) sentencing Pellegrini to a period of imprisonment,
(iii) sentencing Pellegrini to both a fine and imprisonment,
(iv) suspending sentence by not imposing a fine or imprisonment and putting Pellegrini on **probation** with conditions,
(v) sentencing Pellegrini to a fine and/or imprisonment and also putting him on **probation** with conditions; or
(vi) sentencing Pellegrini to a period of imprisonment not exceeding 90 days to be served intermittently and also putting him on **probation** with conditions to be complied with at all times when not in confinement.

21 To arrive at an appropriate sentence for Pellegrini, I must adhere to Lamer C.J.C.'s guidance in R. v. M.(C.A.) (1996), 105 C.C.C. (3d) 327 (S.C.C.) at p. 370, where he wrote that the principal duty of a sentencing judge is to apply the established principles of sentencing in determining a just and appropriate sentence which reflects the gravity of the offence committed and the moral blameworthiness of the offender:

> *the overarching duty of a sentencing judge is to draw upon all the legitimate principles of sentencing to determine a just and appropriate" sentence which reflects the gravity of the offence committed and the moral blameworthiness of the offender.*

22 In addition, the Court of Appeal for Ontario in R. v. Cotton Felts Ltd. (1982), 2 C.C.C. (3d) 287, at pp. 294-295, established deterrence as the paramount consideration for deciding a fit sentence for a public welfare or regulatory offence. Hence, as a sentencing objective, deterrence furthers the aim of public welfare legislation to protect the physical, economic and social welfare of the public, which is essential for the proper functioning of society [emphasis is mine below:

> In our complex interdependent modern society such regulatory statutes are accepted as essential in the public interest. They ensure standards of conduct, performance and reliability by various economic groups and make life tolerable for all. To a very large extent the enforcement of such statutes is achieved by fines imposed on offending corporations. ... Above all, the amount of the fine will be determined by the need to enforce regulatory standards by deterrence: see R. v. Ford Motor Company of Canada Limited (1979), 49 C.C.C. (2d) 1, per MacKinnon A.C.J.O at p. 26; Nadin-Davis, Sentencing in Canada, p. 368 and cases therein cited.

> ...
>
> deterrence is not to be taken only in its usual negative connotation of achieving compliance by threat of punishment. Recently my brother Zuber in R. v. Ramdass, a judgment pronounced on November 17, 1982 [since reported 2 C.C.C. (3d) 247], referred to deterrence in a more positive aspect. There he was dealing with a driving offence and he quoted an earlier unreported decision of this court in R. v. Roussy, [1977] O.J. No. 1208, released December 15, 1977 [summarized 2 W.C.B. 72], where the court stated:
>
> But in a crime of this type the deterrent quality of the sentence must be given paramount consideration, and here I am using the term deterrent in its widest sense. A sentence by emphasizing community disapproval of an act, and branding it as reprehensible has a moral or educative effect, and thereby affects the attitude of the public. One then hopes that a person with an attitude thus conditioned to regard conduct as reprehensible will not likely commit such an act.
>
> This aspect of deterrence is particularly applicable to public welfare offences where it is essential for the proper functioning of our society for citizens at large to expect that basic rules are established and enforced to protect the physical, economic and social welfare of the public.

23 Moreover, not only must the sanction used to achieve particular goals of sentencing be just, the sentencing process itself must also enjoy the acceptance and respect of the community at large: R. v. Sweeney (1992), 71 C.C.C. (3d) 82, 11 C.R. (4th) 1 (B.C.C.A.), at p. 96 of 71 C.C.C. (3d) 82:

> That purpose is achieved if the imposition of legal sanctions discourages both convicted offenders from re-offending and those who have yet to offend from doing so at all. Overlying and influencing the ability of the legal sanction or sentencing process to achieve this purpose, however, is the extent to which that process enjoys the acceptance and respect of the community at large.

24 I must also adhere to the principle of parity, which requires a sentencing court to impose a sentence that is similar to sentences imposed on similar offenders for similar offences committed in similar circumstances. This traditional principle of sentencing has been codified in s. 718.2(b) of the *Criminal Code*.

25 Therefore, a fit sentence should be proportional to the gravity of the offence and the degree of responsibility of the offender: R. v. M(C.A.) (1996), 105 C.C.C. (3d) 327 (S.C.C.).

(a) IMPRISONMENT AS THE APPROPRIATE SENTENCE

26 Sentencing in Ontario's regulatory sphere has developed differently from criminal law sentencing after Ontario replaced the Summary Convictions Act, R.S.O. 1970, c. 450, with new legislation to govern the prosecution of **provincial offences.** Prior to the enactment of the **Provincial Offences** Act, 1979, S.O. 1979, c. 4, regulatory or provincially created offences in Ontario and other provinces were prosecuted and tried under summary convictions legislation that virtually mimicked the procedures from the *Criminal Code*. The enactment of Ontario's new **Provincial Offences** Act, 1979 for regulatory prosecutions recognized the important distinction between regulatory or **provincial offences** and true crimes by repealing the summary conviction procedures that also included the provisions adopted by reference to the *Criminal Code*. Thus, in those provinces that had not enacted its own procedural legislation for the prosecution of regulatory offences, procedures from the *Criminal Code* and any amendments to it still govern regulatory proceedings in those provinces by reference contained in their respective summary convictions acts. Consequently, when the new sentencing principles found in ss. 718, 718.1 and 718.2, which were codifications of common law sentencing principles, were added to the *Criminal Code* in 1996, they applied by reference to **provincial offences** proceedings in those provinces that retained their version of the Summary Convictions Act, but were not automatically applicable to regulatory prosecutions in Ontario because of the existence of the present **Provincial Offences** Act, R.S.O. 1990, c. P-33.

27 However, despite the distinction between regulatory offences and criminal offences, general principles of sentencing are nonetheless applicable to both regulatory and criminal offences in Ontario, such as the principle that imprisonment as a sanction should be used as the last resort. This restraint principle from the common law has now been codified in s. 718.2(d) and (e) of the *Criminal Code*. This development was summarized by Lane J. in R. v Wells (2003), 38 M.V.R. (4th) 93, [2003] O.J. No. 2025 (QL) (O.C.J.) at para. 27 of [2003] O.J. No. 2025 (QL):

> *This use of imprisonment only as a last resort has now been codified in s. 718.2(d) and (e) of the Criminal Code (Canada) and extended to all defendants in criminal courts: R. v. Gladue (1999), 133 C.C.C. (3d) 385 (S.C.C.). These provisions, enacted by Parliament with respect to criminal matters in 1995, require that "an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances," and that "all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders ....." Where Parliament or the Legislature has imposed no statutory minimum sentence, and the liberty of the defendant is at issue, jurists in all courts, including the* ***provincial offences*** *courts, should adhere to the principles of sentencing which are well-established at common law and now codified, with respect to criminal matters, in the Criminal Code (Canada). To do otherwise would be to impose more stringent penalties for quasi-criminal provincial offenses than those customary in criminal matters.*

28 Justice Kikurin in R. v. Kirk (No. 1), [2005] O.J. No. 3316 (QL), 2005 ONCJ 352 (O.C.J.), at para. 16, has also emphasized that universal principles of sentencing apply to both regulatory and criminal proceedings. But the more important aspect of his decision in R. v. Kirk (No. 1) for the context of this sentencing proceeding is that Kikurin J. has also imported the sentencing principles contained in ss. 718, 718.1 and 718.2 of the *Criminal Code* and made them apply to offences under the Business Practices Act. In doing so, he reasoned that these specific sentencing principles had general applicability to both criminal and regulatory offences. However, he did not go as far as importing the conditional sentence provisions from the Criminal Code and make them applicable to the Business Practices Act:

> *There is no provision in the [**Provincial Offences** Act] that is analogous to section 718, section 718.1 or section 718.2 of the Criminal Code of Canada. In other words, there is no specific statutory guideline within the POA that directs the court to general purposes and principles of sentencing. Notwithstanding this lack of specific statutory guidance, it is evident that a sentence cannot just be chosen arbitrarily from the pool of sentence options available in any particular case. Whether an offence is created by a provincial statute, or by federal statute or qualifies as a crime under the Criminal Code, it is subject to universal principles of sentencing that apply to all offences. As a sentencing court, the court imposing the sentence on the defendant Kirk was bound to apply those sentencing principles that were relevant. For purposes of this appeal, I adopt section 718, section 718.1 and section 718.2 of the Criminal Code as provisions that have applicability to the offences in this case for which the defendant was convicted, not because the POA specifically imports these by its own terms, but rather because the provisions of these sections have general applicability whether an offence is a crime or is an offence created by a provincial statute.*

29 Nevertheless, as in criminal prosecutions, imprisonment for regulatory offences is appropriate when the circumstances surrounding the offence and the offender require it. Therefore, do such circumstances exist in this case that necessitates sentencing Pellegrini to a term of imprisonment?

30 The prosecution is adamant that for Pellegrini a custodial sentence is the appropriate sanction, based on his criminal record, his need for rehabilitation, for deterrence (in the widest sense) and because of the nature and particular circumstances surrounding the commission of these seven unfair practice offences.

31 Although custodial sentences are not imposed for most regulatory offences where fault is based on negligence, incarceration is not considered to be inappropriate, on the other hand, when the nature of the regulatory offence is closer to a true crime. My colleague Madigan J.P. in R. v. Virk, [2002] O.J. No. 4102 (QL) (O.C.J.), reasoned that a different approach to sentencing is justified for regulatory offences that resemble a criminal offence and which require proof of intent or knowledge, since the sentencing objectives of denunciation, retribution and deterrence have greater consideration for these type of *mens rea* offences. I had adopted this view in R. v. Beach Motors Inc., [2002] O.J. No. 4458 (QL) (O.C.J.) at para. 30 and so did Whelan J. in R. v. Westfair Foods Ltd., [2005] 10 W.W.R. 752, [2005] S.J. No. 279 (QL) (Sask. Prov. Ct.) at para. 30 of [2005] S.J. No. 279 (QL):

> *In R. v. Virk, supra, Madigan J.P. engaged in a thought provoking discussion of regulatory offences and wrote that not all regulatory offences are equal in gravity and those requiring proof of wrongful intention or knowledge require different considerations when imposing sentence:*
>
>> "[paragraph] 52 R. v. Wholesale Travel Group Inc. (1991), 67 C.C.C. (3d) 193 (S.C.C.) is authoritative caselaw in which the Supreme Court of Canada addresses the distinction between regulatory offenses and criminal offenses at pages 237-238. To paraphrase Justice Cory, criminal law is intended to punish "inherently wrongful conduct", whereas regulatory offenses are aimed at enforcement of "prescribed standards of care" which society wishes to establish and promote. Further, public welfare offenses are "directed not to conduct itself but to the consequences of conduct" and do not imply "moral blameworthiness" in the same manner as criminal fault. ... [paragraph] 54 Not all public welfare offenses are equal in gravity. Some are more serious than others. Those requiring proof of wrongful intention or knowledge are more serious, for sentencing purposes, precisely because the prosecution has proven a guilty mind in addition to the prohibited conduct. Convictions for absolute liability and strict liability offenses usually suggest "... nothing more than the defendant has failed to meet a prescribed standard of care". However, offenses like those alleged and proven in this case tend to involve an element of fault or moral blameworthiness in that they prohibit conduct which is inherently wrong. Quite undeniably, the intention to defraud and the intention to lie qualify as morally blameworthy.'

32 This sentiment that the use of imprisonment in the regulatory context be reserved for offences that resemble or mirror true crimes or that the impugned conduct must be deliberate, reckless or causes significant harm is also emphasized in the reference work of T. Archibald, et al., *Regulatory And Corporate Liability: From Due Diligence To Risk Management* (Aurora, Ontario: Canada Law Book Inc., 2004), updated January 2005, at p. 12-12:

> A jail term of five years for misleading advertising was given the constitutional seal of approval in R. v. Wholesale Travel Group Inc. With respect to actual practice, jail is used as a last resort in regulatory offences, which perhaps recognizes the same considerations that the [Law Reform Commission of

Canada] had in mind. When faced with actually imposing a jail sentence, judges appear to be uncomfortable with doing so in the absence of some level of fault.

In the environmental context, after reviewing numerous cases, Berger offers the following summary of when jail is imposed:

> Jail terms are generally considered by prosecutors and imposed by courts for behaviour that exhibits the hallmarks of crime -- that is, deliberation, recklessness, stealth, and/or significant harm.

...

In practice, it therefore appears that the courts have generally not been willing to impose lengthy jail terms for regulatory offences. Yet. Cory J., in a concurring majority opinion, explicitly commented on the role of jail in regulatory offences:

> Regulatory schemes can only be effective if they provide for significant penalties in the event of their breach. Indeed, although it may be rare that imprisonment is sought, it must be available as a sanction if there is to be effective enforcement of the regulatory measure. Nor is the imposition of imprisonment unreasonable in light of the danger that can accrue to the public from breaches of regulatory statutes. The spectre of tragedy evoked by such names as Thalidomide. Bhopal. Chernobyl and the *Exxon Valdez* can leave no doubt as to the potential human and environmental devastation which can result from the violation of regulatory measures. Strong sanctions including imprisonment are vital to the prevention of similar catastrophes. The potential for serious harm flowing from the breach of regulatory measures is too great for it to be said that imprisonment can never be imposed as a sanction.

33 Furthermore, the authors in, "*Regulatory And Corporate Liability: From Due Diligence To Risk Management*", at p. 12-15, emphasized that sentences of imprisonment are more likely imposed in cases where the offence resembles a true crime:

> *It is also likely that sentences of imprisonment will be more likely in cases where the offence resembles a true crime, such as the case of R. v. Harper, [2003] O.J. No. 4196, where insider trading resulted in a one-year jail sentence (reduced to six months on appeal) and to a combined Fine of just under $4 million reduced to*

> *$2 million on appeal. As an untested hypothesis, it is possible that judges become accustomed to using jail in true crimes where there is deliberate conduct, and find it difficult to make the transition to imposing jail in regulatory offences where deliberate conduct is usually missing.*

34 In the matters before me, there has been deliberate and intentional wrongful conduct. In the seven counts of engaging in unfair practices on which he was convicted, Pellegrini had made misrepresentations about the quality of his private school and its ability to issue high school credits, made false promises of refunds, and unconscionably misled and deceived one parent about a bursary to pay a majority of the tuition if she paid immediately one-third of the tuition upfront. His actions were intentional and aimed to mislead or deceive these parents so that they would enroll their children at St. James and to pay a substantial amount of tuition in advance. Hence, the circumstances that surround these seven unfair practice offences have put them in the category of regulatory offences that resemble a true crime.

35 In addition, Pellegrini has not acknowledged his responsibility for the harm that resulted from his misconduct or accepted any fault for his part in his dealings with the public regarding his private school business, and instead blames his plight on being a bad businessperson, who was unable to make a success of his private school enterprise. In fact, the author of the pre-sentence report has stated that Pellegrini "does not appear to accept responsibility for any intentional fraudulent behaviour; only that he erred in judgment."

36 He is therefore trying to portray himself as a bad businessperson in order to justify his illegal and reprehensible conduct. However, I do not find that his deliberate acts, such as misrepresenting the quality of the private school, misrepresenting the availability of a bursary to a parent of an autistic child, or making a false promise to refund money within 30 days if there were a change of mind, that were used as the means to inveigle the payment of substantial tuition upfront from vulnerable parents to be the acts of an inept or naïve business person, but are more in line with the actions of an unethical and immoral person. Moreover, Pellegrini is an articulate, calculating and smooth-talking individual, the kind of person that had easily preyed on these vulnerable parents that had children with special needs.

37 Although Pellegrini began with a legitimate private school enterprise with noble aspirations, in the end he was no more than a humbug who took advantage of people's vulnerability. During the time these seven offences were committed, he certainly was not an educator nor did he care about the welfare of his students or the people he harmed.

38 In considering the principle of parity in sentencing Pellegrini, there is unfortunately not many reported Business Practices Act sentencing decisions that I can utilize, except for one recent decision. In R. v. Kirk (No. 1), [2005] O.J. No. 3316 (QL), 2005 ONCJ 352 (O.C.J.), Kukurin J., on a sentence appeal, sentenced the offender to a term of imprisonment that totalled seven months to be served consecutively for committing 13 unfair practice offences under the Business Practices Act.

In that particular case, the offender had pled guilty to 13 counts; had a co-accused that was also convicted; had been cooperative with investigators; the financial losses to the victims were about $70,000; the victims of the unfair practices had a portion of their money returned through the trustee in bankruptcy; the offender had been unable to continue working and was on disability benefits and had no financial ability to make full restitution within the two year probationary period; and there was little chance that the offender would be able to make any reparations to the victims. Kikurin J. imposed a custodial sentence but did not impose **probation** with a condition of restitution, since the offender had already served a period of **probation** for two years on the original sentence prior to the sentence appeal being heard and, as such, saw no valid purpose for ordering restitution considering the offender's inability to make restitution.

39 As for the relevant circumstances in this case for comparison, Pellegrini has a criminal record for committing fraud over $5,000; the financial losses incurred by the victims totaled $76,110; he had not been cooperative with the investigation; the victims have not received any reparations; and he is employed and has the ability to make some restitution to the victims. However, I had not seen any indication of remorse from Pellegrini during these proceedings, especially considering he had taken thousands of dollars upfront from these vulnerable families who were persuaded by his deceptive and false statements or promises. That money has been lost and many parents received virtually nothing in return. He has not shown contrition for the consequences of his actions and no concern that his actions have affected the well-being and education of the students who attended St. James and the financial losses suffered by the parents involved. On the other hand, there is also no evidence that he used any of the money to enjoy a lavish lifestyle.

40 Regardless, I agree with the prosecution that for the particular circumstances surrounding the offences that were committed, a custodial sentence would not be inappropriate. The conduct in the seven offences committed contained deliberate, calculated and intentional deception and caused considerable harm to the victims. These misrepresentations, deceptions and falsehoods were intentionally made against vulnerable parents.

41 Although the particular nature and circumstances surrounding the contravention of these *mens rea* type of regulatory offences support the imposition of a custodial sentence, is it necessary to incarcerate Pellegrini for his misconduct, in light of the objectives of sentencing? In other words, would a period of incarceration be the least restrictive sanction, considering the age, character and background of Pellegrini, that I could impose that would achieve the relevant sentencing goals of rehabilitation, general and specific deterrence, separation of offenders, denunciation, making reparations and promoting a sense of responsibility in the offender, or are there other sanctions that I could impose besides a custodial sentence that would achieve these objectives?

(b) AVAILABILITY OF A CONDITIONAL SENTENCE AS A SANCTION FOR REGULATORY OFFENCES

42 Pellegrini argues that conditional sentences used in criminal law sentencing should also apply to sentencing for regulatory matters. The prosecution disagrees, however, with Pellegrini's argument about the availability of conditional sentences for contraventions of provincially created offences in Ontario.

43 Pellegrini's argument for a conditional sentence is first premised on the principle that universal principles of sentencing apply to regulatory offences and secondly, on the ruling in R. v. Hutchings, [2004] O.J. No. 3950 (O.C.J.), which had adopted the use of victim impact statements from the criminal law to regulatory sentencing proceedings. In R. v. Hutchings, the court at para. 7 decided that it could consider a victim impact statement in deciding a sentence because there was no specific provision in the **Provincial Offences** Act to deal with this concept in regulatory sentencing, it could then look to the *Criminal Code* for guidance as specified in s. 2(2) of the **Provincial Offences** Act:

> *Moreover, section 2(2) of the **Provincial Offences** Act grants a **Provincial Offences** Court the right to have recourse to corresponding provisions of the Criminal Code as an aid to the interpretation of the provisions of the **Provincial Offences** Act. In light of the absence of express provisions with respect to victim impact statements in the **Provincial Offences** Act, I have looked to the Criminal Code for guidance.*

44 Hence, Pellegrini argues that since the **Provincial Offences** Act does not make reference to conditional sentences, then in its absence this court could look to the *Criminal Code*. However, that is not what s. 2(2) of the **Provincial Offences** Act was designed to do. Rather, s. 2(2) is an interpretation tool that is used to determine the meaning of provisions in the **Provincial Offences** Act when there is a similar provision in the Criminal Code; it is not intended as a mechanism for adopting procedures from the *Criminal Code* to **provincial offences** when such procedures do not exist under provincial legislation. That had been what the repealed Summary Convictions Act, R.S.O. 1970, c. 450, had been for, to adopt by reference procedures from the *Criminal Code* to regulatory proceedings. Furthermore, in their textbook, "*Ontario **Provincial Offences** Procedure*" (Toronto, Canada: The Carswell Company Limited, 1980), that came out shortly after the enactment of the first **Provincial Offences** Act, 1979, W.D. Drinkwalter and J.D. Ewart at pp. 41-42 refer to the purpose behind s. 2(2) as being an interpretation tool:

> 2(2) Accordingly, if a provision of the [**Provincial Offences**] Act follows closely the wording of a [Criminal] Code section, the difference must be examined in light of the object and purpose of the Act. If, in that context, the change shows that the Legislature's intention was to create a difference in meaning, that intention should be given effect to. However, if no such intention emerges when the change is looked at in the proper interpretative context, then the difference should be ignored, and the Act's provision given the same interpretation as the Code provision in question.

45 Furthermore, s. 2(1) of the **Provincial Offences** Act sets out the purpose of the Act, which is that it replaces the summary conviction procedure used for the prosecution of **provincial offences** in Ontario with a new procedure that reflects the distinction between **provincial offences** and criminal offences:

> 2(1) The purpose of this Act is to replace the summary conviction procedure for the prosecution of **provincial offences,** including the provisions adopted by reference to the Criminal Code (Canada), with a procedure that reflects the distinction between **provincial offences** and criminal offences.

46 Moreover, in R. v. Jamieson (1981), 64 C.C.C. (2d) 550 (O.C.A.), MacKinnon A.C.J.O. held that the **Provincial Offences** Act is an inexpensive and efficient way of dealing with minor offences:

> The **Provincial Offences** Act is not intended as a trap for the unskilled or unwary but rather, as already stated, as an inexpensive and efficient way of dealing with, for the most part, minor offences.

47 Also, in his reference manual, *Libman on Regulatory Offences in Canada* (Salt Spring Island, B.C.: Earlscourt Legal Press Inc., 2002) at p. 11-50 in section 11.2(t), Justice Libman acknowledges that conditional sentences are "creatures of statute" and available under the *Criminal Code*, but that there is no jurisdiction to impose them under provincial legislation:

> Conditional sentences are "creatures of statute". While conditional sentences are available under the provision of the Criminal Code, there is no jurisdiction to impose them under provincial legislation. However, they may be imposed in respect of federal legislation, as in the Bankruptcy and Insolvency Act (Can.), although the principles of deterrence and denunciation may be most appropriately addressed in the particular circumstances by a non-custodial disposition. A conditional sentence may also be appropriate in cases under the Income Tax Act, even where there is a breach of public trust.

48 Furthermore, in R. v. Sawicki (2002), 225 Sask. R. 182, [2002] S.J. No. 608 (QL) (Q.B.) the Court of Queen's Bench had to considered whether a lower court had the jurisdiction to order a conditional sentence for a regulatory offence conviction. At para. 6 of its decision, the court held that conditional sentences are creatures of statute and nothing in the provincial legislation provided for the imposition of a conditional sentence nor did Saskatchewan's *Summary Offences Procedure Act* incorporate the conditional sentence provisions of the *Criminal Code* to the sentencing of **provincial offences** in Saskatchewan:

> *Conditional sentences are creatures of statute. The Wildlife Act, 1998 is provincial legislation. Nothing in that Act provides for the imposition of conditional sentences. The Summary Offences Procedure Act, 1990, S.S. 1990-91, c. S-63.1, which deals with offences charged pursuant to provincial*

> *statutes, incorporates by reference certain portions of the Criminal Code dealing with sentencing. It does not, however, incorporate the provisions relating to conditional sentences. I accept the Crown's argument that the Provincial Court had no jurisdiction to render a conditional sentence for a violation under The Wildlife Act, 1998.*

49 In short, Pellegrini's argument by analogy to R. v. Hitchings is not convincing. Hence, the conditional sentence sanction from the *Criminal Code* does not apply to regulatory sentencing either by reference or import through s. 2(2) of the **Provincial Offences** Act, nor does it apply in the regulatory sphere as a universal principle of sentencing or as a principle of the common law. However, there may be a possible argument for the application of conditional sentences through the principle of creative sentencing in the law of regulatory sentencing.

Creative Thinking In Regulatory Sentencing.

50 There has been a suggestion that sentencing for regulatory offences has not kept abreast with developments in the criminal law sphere, such that regulatory sentencing courts have been creating solutions to address modern concerns. One reference manual has referred to this as the principle of creative sentencing and contends that this principle gained approval from the Court of Appeal for Ontario in R. v. Bata Industries Limited (1995), 25 O.R. (3d) 321, [1995] O.J. No. 2691 (QL) for use in regulatory sentencing. This principle has been described in the reference manual, "*Regulatory And Corporate Liability: From Due Diligence To Risk Management*", at p. 12-18 of the January 2005 update, by the authors that the principle of creative sentencing had been used by a sentencing court in a regulatory matter and that this idea of using innovative sentencing to achieve public good had been upheld on appeal. They also suggest that provincial legislation has to be updated to mirror changes being made in criminal legislation:

> Apart from specific provisions such as those contained in the EPA (Environmental Protection Act], the law of regulatory sentencing at the provincial level has developed in the courts. In the absence of statutory principles, some regulatory courts have been very creative. An early example of creative thinking was the decision of Ormston J. in R. v. Bata Industries Ltd. Bata was a ordered to pay $60,000 to the local Waste Management Board, which funded a program known as "Toxic Taxi" that was used to collect materials from member municipalities. Although the amount was reduced on appeal, the principle of creative sentencing was upheld. Since that decision, it has been generally accepted that a corporation could be put on "**probation**", although there was no explicit recognition in the legislation. This is part of the heritage of the new provisions for corporate **probation** in [Bill] C-45. The provincial Acts need to be updated, however, to mirror the charges made in C-45.

51 Also in, "*Regulatory And Corporate Liability: From Due Diligence To Risk Management*", at

p. 12-13, the authors have indicated that rehabilitation is one of the purposes of a **probation** order and that the rehabilitation principle may be used to impose creative sentencing options through the mechanism of **probation** [emphasis is mine below]:

> Similarly, the traditional sentencing principle of rehabilitation is rarely seen in regulatory law. Rehabilitation has fallen out of favour in criminal law circles, partly because the track record of criminal justice agencies (and in particular the use of prison) to alter personality, has not been successful. Nevertheless, rehabilitation is one of the listed principles of sentencing contained in s. 718 of the Code and is referred to as one of the purposes of a **probation** order in the POA. Rehabilitation of a person or organization is the subject of many debates within criminology.
>
> A court may use the rehabilitation principle under the POA to impose creative sentencing options through the mechanism of **probation,** provided that the statute that has been breached contains a liability for imprisonment. These orders have included terms requiring restitution, funds to be made available to local environmental groups, and publication orders advising of the offence. Orders under this principle have gone so far as to require community service, particularly where the financial means of the defendant were limited.

52 Although the defence seeks the sanction of a conditional sentence used in criminal law sentencing, conditional sentence orders are not provided for under the **Provincial Offences** Act or under the common law for regulatory offences. Under the criminal law, conditional sentences are statutory creations and do not originate from the common law, and therefore, it is not considered to be a universal principle of sentencing. Hence, conditional sentences are not presently available as a sanction in the law of regulatory sentencing. However, it may eventually have its genesis through the rehabilitation principle under the **Provincial Offences** Act as a creative sentencing option independent of a **probation** order, since conditional sentences and **probation** are distinct sanctions in criminal law sentencing. However, the particular circumstances of this case and of the offender do not warrant the need for instigating such a creative sentencing option that is akin to a conditional sentence.

53 Accordingly, a custodial sentence imposed on Pellegrini is the least restrictive sanction that would achieve the desired sentencing objectives of deterrence, denunciation and promoting a sense of responsibility in the offender (which Pellegrini still lacks).

(c) PROBATION AS A SANCTION

54 Authors Drinkwalter and Ewart in their textbook, "*Ontario **Provincial Offences** Procedure*" (Toronto, Canada: The Carswell Company Limited, 1980) at p. 244, have described when **probation** orders can be imposed under the **Provincial Offences** Act:

> A **probation** order may be made only where proceedings have been commenced by an information, and thus cannot be made where proceedings have been commenced under Part I for minor offences or under Part II for parking infractions. As under the Criminal Code, the order may be made where the imposition of sentence is suspended, or in addition to a sentence of imprisonment or a fine, or as part of an intermittent prison term. Under the Act, certain conditions can be included in a **probation** order only if the offence is one for which incarceration is a possible penalty.

55 **Probation** is a sanction that can be used to achieve certain sentencing objectives that is specific to the offender and the circumstances surrounding the offence committed. **Probation** and restitution orders may be appropriate in some situations to address the need for rehabilitation and specific deterrence.

56 For these seven *mens rea* offences Pellegrini had made false, misleading, deceptive and unconscionable consumer representations to consumers, which resulted in considerable harm to them. He also lacks remorse, his victims were vulnerable parents with children with special needs, and he has a criminal record for committing fraud over $5,000. This was not Pellegrini's first involvement with penal offences and the courts. Therefore, in considering these factors and the need for deterrence, rehabilitation, promoting responsibility in the offender and for denunciation, this case requires a sanction that is more than just **probation** with conditions. Imposing a custodial sentence and **probation** would meet the sentencing objectives for this particular offender and the circumstances surrounding the offences committed.

57 The prosecution had sought individual sentences that ranged from 1 month to 4 months imprisonment for the seven offences to be served consecutively. In considering the appropriate length of imprisonment, I have weighed the circumstances surrounding the offences and the background of the offender with the relevant sentencing objectives. Therefore, the appropriate custodial sentence is 90 days for each of the seven counts of committing an unfair practice under s. 17(2) of the Business Practices Act. However, I have decided that these seven sentences should be served concurrently to each other for the reason of Pellegrini's employment and for maintaining his financial ability to make restitution to the victims. On the other hand, imposing custodial sentences to be served consecutively could gravely affect his employment opportunities and ability to make reparations. Although the prosecution sought longer periods of incarceration, a shorter period would still send the appropriate message of denunciation and deterrence to others and to Pellegrini about not engaging in unfair practices under the Business Practices Act. Incarcerating Pellegrini will also achieve the objective of making him recognize that he has to take responsibility for his misdeeds and the harm he caused others from engaging in unfair practices.

58 Moreover, to facilitate Pellegrini's rehabilitation and reparation to some of the victims, I also strongly recommend to the Ontario Parole And Earned Release Board that Pellegrini be seriously considered for the "TEMPORARY ABSENCE PROGRAM" for employment, and will make this endorsement on the warrant of committal, so that Pellegrini will be able to leave the place of his incarceration to attend his employment during working hours of each day and return to that correctional facility after working hours.

Restitution

59 Despite Pellegrini's submissions for a free standing restitution order, I do not have the jurisdiction to impose such a stand alone restitution order under either the Business Practices Act or under the **Provincial Offences** Act nor under the common law. In R. v. Kirk (No. 2), [2006] O.J. No. 349 (QL), 2006 ONCJ 22 (O.C.J.), Kukurin J. concluded that a sentencing court does not have the jurisdiction to impose a stand alone restitution order because the Business Practices Act does not expressly or specifically provide for such a sanction. Kukurin J. also reasoned that since the Business Practices Act does not expressly and specifically provide for **probation** or restitution as a sanction then a sentencing court can only look to the **probation** or restitution provisions under s. 72 of the **Provincial Offences** Act.

60 After analyzing the provisions in s. 72(3), Kukurin J. concluded that the jurisdiction to order restitution could only be done if it is part of a **probation** order. It could not stand on its own. Thus, ordering restitution can be included as a condition in a **probation** order under s. 72(3)(a) if the governing statute over the offence (or the Business Practices Act in this case) specifically provides for it. However, if the offence-creating statute does not provide for it, then Kukurin J. concluded that it could possibly be included in a **probation** order under s. 72(3)(c) based on the circumstances of the offender's need for rehabilitation or for specific deterrence. However, he remained skeptical about the correctness of imposing restitution as a condition of **probation** under s. 72(3)(c), considering that s. 72(3)(a) contains a specific power to impose restitution with limitations (if the offence-creating statute allows for it), while s. 72(3)(c) is a catch-all provision that may allow restitution when there is a need to prevent further unlawful conduct from the offender or for purposes of rehabilitating the offender [emphasis is mine below]:

> 72(3) In addition to the conditions set out in subsection (2), the court may prescribe as a condition in a **probation** order,
>
> (a) that the defendant satisfy any compensation or restitution that is required or authorized by an Act;
>
> ...
>
> (c) where the conviction is of an offence punishable by imprisonment, such other conditions relating to the circumstances of the offence and of the defendant that

contributed to the commission of the offence as the court considers appropriate to prevent similar unlawful conduct or to contribute to the rehabilitation of the defendant; or

61 Kukurin J. was also concerned that if the Business Practices Act did not specifically provide for restitution, then it could be inferred that provincial legislators did not intend that restitution be available as a sanction for committing an offence under that particular statute, despite s. 72(3)(c) of the **Provincial Offences** Act that could allow for any condition to be included in a **probation** order that would encourage the rehabilitation of an offender, which could include making restitution.

62 Ultimately, Kukurin J. did not decide that restitution could not be imposed as a condition of **probation** under s. 72(3)(c). Although he was very uncomfortable with the possibility that restitution could be included in a **probation** order without such a sanction be specified in the offence-creating statute, he instead chose not to impose restitution against the offender in that particular case because there was the absence of special circumstances that would justify imposing restitution. Kukurin J.'s doubts about using s. 72(3)(c) to impose restitution and his resolve not to have such sanction apply to that particular offender or to those peculiar circumstances of that case were stated at para. 28 of R. v. Kirk (No. 2), [2006] O.J. No. 349 (QL):

> *However, paragraph (c) presents some difficulties as well. The* ***probation*** *conditions permissible under this paragraph are not specified. This paragraph is what is sometimes called a "catch all" clause, legal jargon for wide and unspecified choices of conditions of* ***probation*** *allowed to the court. It was under section 72(3)(c) that the restitution condition was included in the* ***probation*** *order in R. v. Gnish. What was not addressed in that case, and what troubles me in the present case, is the presence of section 72(3)(a) POA. I have considerable difficulty in by-passing a specific provision that gives me a choice, albeit restricted, of restitution, in favour of a non-specific provision that is so general that it has virtually no restrictions at all. Using the catch all is tantamount to doing an end run around legislation that constrains sentencing options. I have to assume that these constraints were included for some purpose. Resorting to section 72(3)(c) is part of the stretch I cannot bring myself to make in this case.*

63 In any event, Kukurin J. did not impose restitution or **probation** against the offender because he was concerned about the difficulty in determining the actual losses of the victims and felt that a civil court would be more experienced to make that determination; that there was a co-accused involved and responsible for an underdetermined portion of the losses; that there was no reasonable prospect that the offender could actually make restitution so that Kukurin J. would only being inviting a breach of the restitution order if it were made; and that there was no valid purpose for requiring a **probation** order to be made for purposes of rehabilitation or deterrence, except that it was simply a vehicle for the prosecution to obtain a restitution order, since a stand alone restitution order was not available under the Business Practices Act.

64 Also, in the reference manual, "*Regulatory And Corporate Liability: From Due Diligence To Risk Management*", at p. 12-8 of the January 2005 update, the authors suggest that other sentencing goals such as deterrence and reparation should also be used for considering the making of a **probation** order besides the rehabilitation of the offender:

> *At present, under s. 72 of the POA, **probation** is only available for those offences that carry a term of imprisonment. Under the classification advanced in this book, this will cover most if not all strict liability offences. The language employed in s. 72, however, needs to be updated, as it refers to rehabilitation of the offender which, while relevant, is not the only principle on which a **probation** order ought to be made. Deterrence and reparation can also be relevant.*

65 Furthermore, in Drinkwalter and Ewart's tome, "*Ontario **Provincial Offences** Procedure"*, at p. 245, the authors reviewed the possibility of restitution in a **probation** order imposed under the **Provincial Offences** Act and concluded that restitution is inappropriate where the nature of the regulatory offence is based on negligence, unless the offence-creating statute actually permitted such a sanction to be imposed, but may be acceptable for regulatory offences that resemble true crimes [emphasis is mine below]:

> Compensation or restitution can only be ordered where specifically authorized by the enactment creating the offence. The **Provincial Offences** Act itself does not grant this authorization. Without this inherent limitation, there would be significant potential for many persons to see **provincial offence** proceedings as a cheap and expeditious way to recover money for damages, particularly damages to automobiles. Although restitution and compensation are becoming more frequently used sentencing tools in criminal cases, and in accord with modern theories of criminal law, without careful, specific regulation they are inappropriate for **provincial offences** which generally relate to damage by negligence rather than by intent. The type of regulation required is beyond the ambit of a general, procedural statute; instead it will have to be enacted by the Legislature each time restitution or compensation is thought appropriate in relation to a particular statute or offence.

66 Thus, in special circumstances, the sanction of **probation** with a condition of restitution would be appropriate to address the objectives of rehabilitation, denunciation, reparation and specific deterrence, where the nature of the regulatory offence is one which resembles a true crime. This case is such a special case. I therefore read s. 72(3)(c) to permit a condition of restitution to be imposed against Pellegrini in a **probation** order, since the seven unfair practice offences committed by Pellegrini are regulatory offences that resemble true crimes.

67 In this case, the prosecution seeks full restitution for all seven matters. However, is it reasonably possible for Pellegrini to make restitution in the amount of $76,110 within two years, in light of his ability to pay? Pellegrini is employed and has the ability to pay some restitution, but not for the full amount of losses incurred for the seven offences.

68 Unfortunately for some of the victimized families, I have decided that only two of the families in these proceedings should receive restitution from Pellegrini under a **probation** order. For the two families that will receive full restitution, I have first chosen the family of Jackie M., who has an autistic child and paid $10,100 to Pellegrini on his lie that there would be the possibility of a bursary from a Montreal company for tuition if the $10,100 was paid immediately and that she could get a full refund within 30 days if she changed her mind. Jackie M. paid the money and then informed Pellegrini that she had changed her mind within the 30 days, but Pellegrini did not return her money. For the second family to receive full restitution, I have chosen the family of Linda D, and her adopted son, Christopher. Christopher has suffered a traumatic incident in his life, in that he has lost both of his parents. Christopher's money is being held in trust for him and managed by the Office of the Children's Lawyer. To enroll Christopher at St. James, $15,190 dollars was paid from that trust fund to Pellegrini after his legal guardian, Linda D., relied on the misrepresentation that St. James granted high school credits. When it came to light that St. James could not grant high school credits, Linda D. attempted to get the return of Christopher's money before Christopher would actually begin classes at St. James. Pellegrini did not return the money and had no intention of returning the money. As such, these two cases were the most serious in terms of hardship for the families and for moral blameworthiness of the offender. I find therefore that for these two situations full restitution is in order.

69 An order for restitution is appropriate in this case since making restitution will help in Pellegrini's rehabilitation, make him recognize the harm caused by his misconduct and repair some of the harm done to these two families. Unfortunately, I cannot order full restitution for all the victims in the seven matters. I empathize with their misfortune and disruption to their lives, but in deciding which of the seven victimized families had the greatest need I chose the families of Jackie M. and Linda D.

70 For four of the victimized families (Anna and Angelo M., Nadine and Douglas D., Kadwali K. and David G.C.), their children actually attended St. James and received some educational services, although not what they had bargained for. They were nevertheless victimized and significantly harmed by Pellegrini's deceptions and misrepresentations. Their losses, hopefully, can be recouped through the civil courts.

71 In deciding that some of the victimized families in this proceeding will have to seek a remedy in courts of civil jurisdiction, I took note of Kukurin J.'s comments in R. v. Kirk (No. 2), at para. 39, where he emphasized that the primary function of his appeal court was not to redress the wrongs or the financial losses sustained from wrongful conduct since the civil courts were better equipped to deal with compensation, allocating liabilities and determining actual loss:

> *While this court has great sympathy for the victims of the defendant, the primary*

> *function of this court is not to redress the wrongs or the losses sustained by one member of the community as a result of conduct of another. That is more the province of courts of civil jurisdiction which are much more suited to determining matters of compensation and restitution, determining quantum, and allocating liabilities. This proceeding is, in fact, one step removed from the trial court and does not even have the advantage of having heard any of the evidence; this court is dealing with an appeal against sentence.*

72 The last victimized family (Xue Feng) can also seek redress in the civil courts, or through indemnification from Like Xu, who had been in collusion with Pellegrini in some kickback agreement for recruiting and bringing students from China on student visas to study at St. James. Also, I find that the hardship for the Feng family in not being part of this court's restitution order is not as grave financially to them as it would be for the two families that I have chosen should receive full restitution from Pellegrini through a **probation** order.

5. DISPOSITION

73 Therefore, after considering the relevant factors, the fit and proper sentences for Pellegrini, who committed seven offences of engaging in an unfair practice under s. 17(2) of the Business Practices Act are the following:

IMPRISONMENT AND PROBATION

(i) **Count #1 (Anna and Angelo M.)**

> *For count #1, I sentence Pellegrini to serve a period of imprisonment for 90 days to be served concurrently.*

(ii) **Count #2 (Nadine and Douglas D.)**

> *For count #2, I sentence Pellegrini to serve a period of imprisonment for 90 days to be served concurrently.*

(iii) **Count #3 (Linda D.)**

> *For count #3, I sentence Pellegrini to serve of a period of imprisonment*

*for 90 days to be served concurrently and upon completion a term of **probation** for two years with conditions, including restitution.*

(iv) **Count #5 (Jackie M.)**

*For count #5, I sentence Pellegrini to serve a period of imprisonment for 90 days to be served concurrently and upon completion a term of **probation** for two years with conditions, including restitution.*

(v) **Count #6 (Kadwali K.)**

For count #6, I sentence Pellegrini to serve a period of imprisonment for 90 days to be served concurrently.

(vi) **Count #8 (Xue Feng)**

For count #8, I sentence Pellegrini to serve a period of imprisonment for 90 days to be served concurrently.

(vii) **Count #9 (David G.C.)**

For count #9, I sentence Pellegrini to serve a period of imprisonment for 90 days to be served concurrently.

CONDITIONS OF PROBATION (INCLUDING RESTITUTION)

74 The prosecution seeks a condition that Pellegrini not be employed where there is the presence of minors, but I see no reason to impose such a condition in the **probation** order. Such a condition would also prevent him from engaging in legitimate employment. However, the other conditions that the prosecution seeks are reasonable, appropriate and adequate to meet any concerns about Pellegrini being involved in similar activities where unfair practices could be committed against the public. Also, the remaining conditions sought by the prosecution would adequately protect the public and assist in rehabilitating Pellegrini.

75 Therefore, I impose the following conditions in the **probation** order:

(a) The **probation** order will commence on the day following the completion of the custodial sentences. It will be for a period of two years with the following conditions:

(1) The Offender shall not commit the same offence or any related or similar offence, or any offence under a statute of Canada or Ontario or any other province of Canada that is punishable by imprisonment.

(2) The Offender shall appear before the court as and when required.

(3) The Offender shall notify the court of any change in the Offender's address.

(4) The Offender shall report in person within two (2) working days after having served his custodial sentences to a **Probation** Officer at the Old City Hall courthouse, 60 Queen Street West, Toronto and thereafter report once a month to a **Probation** Officer as directed and thereafter be under the supervision of a **Probation** Officer or a person authorized by the **Probation** Officer to assist in the supervision of the offender.

(5) The Offender shall not operate a private school.

(6) The Offender shall not operate or be a director of a business in which money is to be paid upfront or in advance of any service or good being delivered or provided.

(7) The Offender shall pay restitution in the amount of $15,190 to "Linda D. in trust" (count #3). Such Restitution is to be paid in installments of $750 per month until the $15,190 is paid in full. The $750 monthly payment is to be paid to the restitution clerk located in room 5A at the Old City Hall courthouse, 60 Queen Street West, Toronto, Ontario, on the first day of each month until the full restitution is paid. The first installment is required to be made on the first day of the month that immediately follows the completion of the offender's custodial sentence (for example: if the offender completes his custodial sentence on October 5, 2006, then the offender is required to pay his first installment of $750 on November 1, 2006). If the first day of a month falls on a weekend or a holiday then the $750 monthly installment is required to be paid on the next working day.

(8) The Offender shall also pay restitution in the amount of $10,100 to "Jackie M." (count #5). Such Restitution is to be paid in installments of $500 per month until the $10,100 is paid in full. The $500 monthly payment is to be paid to the restitution clerk located in room 5A at the Old City Hall courthouse, 60 Queen Street West, Toronto, Ontario, on the first day of each month until the full

restitution is paid. The first installment is required to be made on the first day of the month that immediately follows the completion of the offender's custodial sentence (for example: if the offender completes his custodial sentence on October 5, 2006, then the offender is required to pay his first installment of $500 on November 1, 2006). If the first day of a month falls on a weekend or a holiday then the $500 monthly installment is required to be paid on the next working day.

R. QUON J.P.

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