C A N A D A
Province of Quebec
District of Montreal

Municipal Court

No. 34345177-95

TOWN OF DOLLARD-DES-ORMEAUX
June 20, 1996

PRESENT:

The Honorable **PIERRE MONDOR**
Justice of the Peace

TOWN OF DOLLARD-DES-ORMEAUX

Prosecutor

vs

STORTO, Diana

Defendant

JUDGMENT ON AN APPLICATION BY THE COLLECTOR FOR AN ORDER OF EMPRISONMENT AND WARRANT OF COMMITTAL OF DEFENDANT

The collector of fines of the Municipal Court of Dollard-des-Ormeaux, Me Chantale BILODEAU, has presented two Applications for an Order of Imprisonment and a Warrant of Committal of the defendant before

the judge of the Municipal Court of Dollard-des-Ormeaux acting as Justice of the Peace in respect of this case and case 34494575-95.

Prior notice of presentation of the Applications was served on the defendant and she has contested these Applications.

A. **THE FACTS**

Judgments in the two cases relating to offences under the Highway Safety Code were rendered by default on August 10, 1995. Notices of Judgment were sent on August 14, 1995. The delay to pay the fines and costs expired on September 14, 1995.

On October 10, 1995, the defendant met with Ms. Nancy CLERMONT, also a collector acting in the Municipal Court of Dollard-des-Ormeaux, to register for the Compensatory Work Program under the conditions of Article 333 of the *Code of Penal Procedure* which reads as follows:

> «Where a collector has reasonable grounds to believe that seizure does not or will not permit the recovery of the sums due from the defendant and is convinced, after examining the defendant's financial situation, that the defendant is unable to pay, he may offer the defendant the option of paying the sums due by means of compensatory work, depending in particular on the availability of compensatory work programs.»

On that occasion, the collector took all the necessary information from the defendant for the purposes of the Program and sent the paperwork to the YMCA of Montreal for processing.

A pamphlet of the Compensatory Work Program has been filed by the defendant as Exhibit D-1 and contains basic information concerning the role of YMCA of Montreal as a referral agency:

> «...The YMCA of Montreal is responsible for implementing the Compensatory Work Program in the Judicial District of Montreal. As a referral agency, the YMCA must insure that the bank of participating community organizations meets its requirements. Its principal responsibility is to match each participant with the community organization that best corresponds to his abilities. This is partly achieved through an interview with a counsellor who tries to draw the profile of the worker, based on his other work experience, his or her personality and the various social difficulties he or she might be experiencing.
>
> Once the work referral schedule has been established, the responsibility of the referral agency is to ensure that the assignment is successful and that the needs of the community organization are taken into consideration.

> Participating community organizations are asked to specify their needs to the YMCA Compensatory Work Program, which in turn, attempts to meet these in the best way possible. For the participant, the community organization plays the role of employer (integration, interaction, expectations, supervision) and intervener. As such, the organization must ensure that the work plan is followed as regards attendance, punctuality, work quality and the attitude of the worker. In the event that an intervention is unsuccessful, the counsellor from the Montreal YMCA, advised of the situation during a regular follow-up, will intervene regarding the agreement. After considering the report from the supervisor and discussing the situation with the participant, the counsellor may transfer the dossier or close the case. If the work has been successfully completed, the participant is exonerated from his infraction. A failed compensatory work experience leaves the participant with one of two choices: payment of the fine or incarceration...»

Two days later, after the file of defendant had been sent to the YMCA of Montreal, Mr. Eric Lagacé, Director of the Compensatory

Work Program at the Montreal YMCA, informed the collector that the defendant had been excluded from the Program for a period of time.

Me Chantale Bilodeau, then contacted the Ministry of Public Security of Quebec to determine whether the defendant could be referred to another agency in order to participate in a program. The collector was informed that since the defendant resided in the Judicial District of Montreal, only the agency designated by the Ministry of Public Security for that district could refer the defendant to participating agencies for a program. This appears from a letter addressed to the collector by the *Direction du partenariat et du conseil en services correctionnels* of November 24, 1985, filed as Exhibit P-1.

The collector then advised the defendant that she was refused for the Program and suggested that an agreement be made for the payment of the sums due. The collector even suggested the payment of small amounts over a period of time. The defendant refused to pay any amount whatsoever.

The defendant informed the collector that she was contesting a similar application before the Municipal Court of Pierrefonds. It was therefore agreed between the collector and the defendant that they would wait for the decision of that Court before proceeding with these Applications.

The application made before the Municipal Court of Pierrefonds was granted and an order of imprisonment was issued. Since the defendant was released from prison after serving only a very small portion of the

sentence, she then contacted the collector of Dollard-des-Ormeaux telling her to file the Applications and that she would not contest them.

The collector determined that the defendant refused to pay the fines and costs, that the seizure of defendant's assets would not be sufficient to pay these sums, and that it was not possible to offer compensatory work to the defendant. Consequently, the collector applied for Orders of Imprisonment.

The collector has explained the five (5) month delay between the defendant's application for participation in the Program (October 10, 1995) and the date that the Applications for Orders of Imprisonment were presented (March 28, 1996.) She explained that this was the normal processing period for these Applications except for a 1 to 1 1/ 2 month delay when she and the defendant awaited the outcome of the latter's contestation of the similar application before the Municipal Court of Pierrefonds.

As the collector had already determined that there was a refusal on the part of the defendant to pay the fines and costs which were due, that in fact the sums due had not been paid and that it was not possible to offer compensatory work to the defendant, she filed these Applications pursuant to Articles 346 of the *Code of Penal Procedure* which reads as follows:

> «Where the defendant fails to honour his agreement to present himself to the collector, where it has not been possible to offer compensatory work or where the defendant

> refuses or neglects to carry out such work, and if the sums due have not been paid, the collector may apply to a judge for an order of imprisonment and a warrant of committal of the defendant ..."

The judge must proceed under Article 347 of the Code of Penal Procedure:

> «The judge may order imprisonment and issue a warrant of committal if he is satisfied that the measures provided for in this chapter to recover the sums due do not permit, in this particular case, full recovery of the sums due.
>
> The reasons for ordering imprisonment shall be given in writing.»

At this stage, the judge must decide if the circumstances of the case are such that Articles 346 and 347 apply: Are we faced here with a situation where, either it has not been possible to offer compensatory work to the defendant or also where the defendant refuses or neglects to carry out compensatory work, even if the Applications were based solely on the first of these two grounds? As well, is it a fact that no other measure is available?

Mr. Lagacé, a criminologist and the Director of the Compensatory Work Program with the YMCA of Montreal, testified on the foregoing in

great detail based on his personal knowledge of matters relating to the defendant and also based upon the notes contained in the Defendant's file.

Mr. Lagacé explained the circumstances which led to the decision made in October 1995 to deny access by the defendant to the Compensatory Work Program for a period of five years. This decision was confirmed by a letter dated October 25, 1995, signed by the Director (Eric Lagacé), the Senior Counsellor (Johanne Beauvilliers) and the defendant's Counsellor (Marc Harelle), a copy of which was filed as Exhibit P-2.

Mr. Lagacé explained that on July 20, 1994, the defendant had, a first time, been barred from the Compensatory Work Program. He explained the reasons for this decision including the fact that while she participated in the Program for previous infractions, the

defendant was difficult, abusive, not reliable and disruptive. She was often late or absent from the work she had agreed to do, usually without any valid reasons. He also described an extremely disturbing and disruptive tantrum thrown by the defendant at the West Island Community Resource Centre on July 20, 1994. The Police and the Pointe-Claire Public Security had to be called to restore order.

The introduction of Mr. Lagacé involving the incident at the West Island Community Resource Centre on July 20, 1994, was corroborated by Mrs. Kathleen Doherty, the Director of the West Island Community Resource Centre, who had just assumed her duties a few days previously and did not know the defendant at all until then.

Mrs. Doherty explained the circumstances surrounding the defendant's tantrum at the Centre on July 20, 1994. She described the defendant's language and actions as abusive and filthy. She displaced a secretary at her desk, emptied drawers onto the floor, kicked things around the room, yelled and screamed. Mrs. Doherty became seriously concerned for the security of other persons in the Centre at that moment.

She indicated that the defendant was not scheduled for work on July 20, 1994, and had no right to be at the Centre.

She also stated that the defendant ran out of the building when she heard the police sirens. She saw the defendant check her car doors before running across the street. This led her to believe that defendant had come to the Centre with the vehicle and did not want the police to know this.

Mr. Lagacé also explained that just prior to the incident at the West Island Community Resource Centre, the defendant had complained of sexual harassment by her Counsellor, Mr. Marc Harrelle. Mr. Lagacé described Mr. Harrelle as an experienced and competent counsellor against whom he has not received any other complaints whatsoever. He also explained that as a result of this complaint by the defendant, a meeting was organized on July 11, 1994, to deal with the defendant's request for a change of Counsellor. Mr. Lagacé indicated that at the end of this meeting (at which he was not present), the defendant agreed that Mr. Harrelle would continue as her Counsellor. However, he ceased to be her Counsellor on July 20,1994, and the Director

himself took over the defendant's file.

Then Mr. Marc Harrelle testified about his role with the defendant. He was the Counsellor appointed to the defendant up to July 20,1994.

Mr. Harrelle explained that the defendant apparently felt that he had been «suggestive» towards her in March 1993 during a telephone conversation when he requested that she bring a medical certificate to the office rather than send it by fax. He indicated to the Court that since the fax machine was for the entire YMCA and since there was no way of ensuring confidentiality (which was particularly important in the defendant's case since she had mentioned repeatedly to him that she was undergoing therapy), it was their policy that participants in the Program bring documents directly to the YMCA. He also told the Court that these documents are left at the reception and would not have been brought by defendant directly to him in any event.

He explained that since the defendant felt that she had been exploited by him and that she wanted to change Counsellor, a meeting was arranged on July 11, 1994. The persons present at this meeting were himself, the defendant and Mrs. Johanne Beauvilliers, the Senior Counsellor. He indicated to the Court that he told the defendant that under no circumstances did he intend being suggestive and that if his tone of voice had in fact been seemingly suggestive, he was very sorry and apologized. He also stated that at the end of the meeting, the defendant agreed that he would continue as her Counsellor.

During cross-examination of Mr. Harrelle carried by the defendant she suggested that at this meeting, Mr. Harrelle stared at her breasts,

looked at her in a lewd fashion and smirked. He denied any such behaviour.

Mrs. Beauvilliers is the Senior Counsellor of the Compensatory Work Program.

Mrs . Beauvilliers described the circumstances leading up to the meeting of July 11, 1994. She confirmed that at the end of the meeting, the defendant accepted that Mr. Harrelle continue as her Counsellor. In fact, Mrs. Beauvilliers testified that the defendant stated to her at this meeting that she was comfortable continuing with Mr. Harrelle.

On cross-examination, Mrs. Beauvilliers stated that during the meeting of July 11, 1994, she was sitting in a position to see both the defendant and Mr. Harrelle. She testified that she placed herself in such position specifically to observe the meeting. She stated that she did not see any lewd looks or smirks by Mr. Harrelle nor did she see Mr. Harrelle stare at defendant's breasts. She confirmed that the defendant was to contact her Counsellor for further instructions concerning the compensatory work and that no specific date was yet assigned to the defendant at the West Island Community Resource Centre.

During the course of her own testimony, the defendant has attempted to minimize her misbehaviour by alleging for example that as a citizen of the West Island of Montreal she had the right to remain on the site of the West Island Community Resource Centre to consult

documentation and that she did not cause any turmoil other than insisting that she was to carry on her compensatory work.

On the other hand, the accusations of the defendant against Mr. Marc Harrelle were not supported by a «shred of evidence» (quoting the attorney for the Prosecution). Even if we were to rely solely on the testimony of the defendant, she bases her accusation on mere suspicion by the tone of a voice in a telephone conversation and to totally implausible eye movements as Mrs. Beauvilliers was present beside Mr. Harrelle. The accusations of the defendant against Mr. Harrelle are undoubtedly unfounded and they demonstrate a total lack of social responsibility on the part of the defendant. Even if this judgment exonerates Mr. Harrelle, serious damages might be suffered from accusations of this nature.

Notwithstanding the decision in 1994 to exclude the defendant from the Program, Mr. Lagacé explained why he agreed in April 1995 to give defendant a second chance. As
stated by Mr. Lagacé, he had hardly begun to approach resource centres on behalf of the defendant when she told him in no uncertain terms that she refused to go to Domremy to do compensatory work. In view of this attitude and her continuing abuse of the Counsellors and personnel of the Montreal YMCA as described in the letter of October 25, 1995, filed as Exhibit P-2, the Senior Counsellor, Johanne Beauvilliers, advised the defendant on October 12, 1995, that she would no longer have access to the YMCA Compensatory Work Program for the said period of five years and this was followed up by said letter.

Considering the evidence as a whole, we are convinced that defendant was difficult, abusive, unreliable, often late or absent without reason, and was disruptive. The letter of October 25, 1995, filed as Exhibit P-2, is eloquent on the behaviour of the defendant, her attitude and of her abuse of the persons involved with the Program. The fact is that the defendant's behaviour virtually made it impossible for the Director of the Compensatory Work Program to place her with a resource centre. In fact, to impose upon resource centres a person with the track record of the Defendant could result in many resource centres withdrawing from the Program. This would create a serious loss for those offenders who honestly use the Compensatory Work Program as it was intended, to discharge their fines instead of being imprisoned. This is a purpose which is to the obvious benefit of needy offenders as well as to the society in which they live.

The Director of the Compensatory Work Program has an obligation to the resource centres which agree to participate in the Program. This obligation includes ensuring to the extent possible that the offenders he sends them will not place the personnel and the other persons who depend upon the resource centre at risk, or disrupt their activities.

The Defendant benefited from the Compensatory Work Program until she was denied further access on July 20, 1994. The Director of the Compensatory Work Program hoping that the defendant had changed her attitude and her behaviour, agreed in April 1995 to give her a second chance, which was not taken advantage of by the Defendant.

The Defendant has pushed the system to and beyond its limits. When she meets resistance to her demands, she becomes abusive, using reprehensible language and making threats. She has treated the Work Compensatory Program as if it is there to serve her. Her behaviour and her demands have surely required that a disproportionate amount of the Program time and resources be devoted to handling her case, to the detriment of the other participants.

The Defendant would probably like to do compensatory work instead of being imprisoned. In fact, she obviously feels that it is her absolute right to do compensatory work instead of paying a fine, just as she also feels that it is her absolute right to do such work on her own terms, what she wants to do, when it is convenient for her to do it, where she wants to do it and with whom. The mere mention of the possibility for the defendant to do compensatory work at the Domremy Centre brought an immediate and hostile refusal on her part to even consider it.

Finally, defendant herself in her own argument has discarded the possibility of performing compensatory work when she concluded as follows:

> «Between me and the YMCA, I don't think it will work. I don't want to work with him and I believe he doesn't want to work with me.»

B. **THE LAW**

Considering the attitude of both defendant and the referral agency, the YMCA of Montreal, the attorney for the Prosecutor acting de facto for the collector contends that the conditions of Article 346 of the Code of Penal Procedure are satisfied in that it is not possible to offer compensatory work to the defendant.

Furthermore, he contends that Article 333 gives the collector discretion by using the word «may» when time comes to offer compensatory work to a defendant and that in any event the collector did in fact exercise her discretion in a perfectly reasonable and fair manner.

Incidentally, the attorney for the Prosecutor submits that the defendant has repeatedly violated the law. Despite the fact that the vehicle owned by the defendant is not properly registered and is not insured, and despite the fact that the defendant's drivers permit is under sanction, the defendant obviously feels that it is her absolute right to flout the law, to violate its provisions at will, not to honour or respect her obligations and yet to continue to enjoy the benefits of this privilege which is the Compensatory Work Program even as she continues to make a mockery of the Highway Safety Code. He submits that defendant would then have lost her eligibility to compensatory work as a result of her defiant attitude towards the law in general.

In order to determine how we should evaluate these arguments, we have to compare the applications of Articles 333, 346 and 347 of the *Code of Penal Procedure*. The first two concern the role of the collector and the third concerns the role of the judge. A careful review of those Articles convinces us that they apply totally independently from one another. The collector acts within his field of competence pursuant

to Articles 333 and 346 and the judge acts within another field of competence pursuant to Article 347.

a) The field of competence of the collector has to do with;

i) offering or not offering a defendant the option to pay the sums due by means of compensatory work depending in particular on the availability of compensatory work programs;

ii) applying or not applying to a judge for an order of emprisonment of a defendant whether one of the three following conditions is met or if none is met:

- where defendant fails to honour his agreement or present himself to the collector,

- where it has not been possible to offer compensatory work to the defendant;

- where the defendant refuses or neglects to carry out such work;

b) The field of competence of the judge has to do with ordering or not ordering the imprisonment of a defendant whether he is satisfied or not that the measures provided for in Chapter XIII of the *Code of Penal Procedure* titled EXECUTION OF JUDGMENTS to recover the sums due (implicitly through direct payment or the carrying out of compensatory work) do not permit, in the

particular case, full recovery of the sums.

Our work hypothesis at this stage is that the collector and the judge respectively carry out his task and decide within their respective field of competence on grounds which may be slightly different, but the judge does not theoretically sit in appeal of a decision already taken by the collector. Of course, the judge may differ in opinion with the collector, as to how and if the measures should permit the recovery of the sums due, but his decision is confined to the granting or dismissing the application and he may not order anything else. Our reasoning is based on the following considerations.

As a preliminary consideration, the meaning of the word «may» in the three Articles 333, 346 and 347 must be studied.

On this subject, Article 51 of the *Interpretation Act (L.R.Q. C. 1-16)* holds that:

> «Whenever it is provided that a thing «shall» be done or «must» be done, the obligation is imperative; but if it is provided that a thing «may» be done, its accomplishment is permissive.»

In his book Interprétation des lois(), Pierre-André CÔTÉ comments as follows:

> «Lorsqu'une disposition confère un pouvoir ou une faculté, elle est rédigée dans des

> termes qui, à première vue, paraissent n'impliquer aucune contrainte, aucune obligation quelconque d'exercer le pouvoir ou de se prévaloir de la faculté. Des expressions telles «le Conseil a le pouvoir de ou «la Commission peut», sont, d'après leur formulation même, purement potestative. Cela est d'ailleurs confirmé, en ce qui concerne les mots «peut» ou «pourra» par des dispositions des lois d'interprétation.
>
> Pourtant, ces dispositions des lois d'interprétation ne sont applicables que dans la mesure où «l'objet, le contexte ou quelques dispositions» de la loi ne s'y opposent pas: elles ne valent qu'à titre de présomption. En pratique, il arrivera assez fréquemment que le contexte ou l'objet permettront de conclure que le pouvoir conféré ou la faculté accordée n'est pas absolument discrétionnaire. Il se peut en effet qu'un pouvoir soit assorti d'un devoir d'exercer le pouvoir en question lorsque certaines circonstances sont réunies.»

He then acknowledges that the attempt by the legislator to withhold a discretion in the word «may» has not succeeded[()]:

> «Quels sont les cas où l'on peut dire que le

> contexte, la matière ou l'objet ont assorti le pouvoir d'un devoir de l'exercer? Il faut d'abord souligner que la définition du mot «peut» dans les lois d'interprétation n'a pas empêché les tribunaux de conclure, dans certains cas, que ce mot ne conférait pas de marge de discrétion au titulaire du pouvoir. La définition étant donnée à titre de simple présomption, elle peut être écartée par les circonstances d'une espèce et si, en définissant le mot «peut», le législateur entendait mettre fin à la controverse autour de ce mot, il faut constater que cette tentative fut un échec.»

He further describes three categories where the word «may» means «shall»[]:

> « ... un premier groupe est constitué de ceux où le ou les mots en question sont attributifs d'une compétence judiciaire ou quasi judiciaire ...
>
> Un second groupe de décisions est formé des cas où le tribunal constate que le pouvoir a été attribué en vue d'assurer la mise en oeuvre d'un droit ...
>
> ... Dans un troisième groupe d'affaires, on

> déduit le caractère impératif du mot «peut» du contexte, de l'historique législatif, de la finalité de la loi, ou d'une considération des effets néfastes que produirait une discrétion, effets que le législateur est réputé vouloir éviter; en somme, le tribunal fait appel aux règles générales d'interprétation en vue de déterminer si le législateur a voulu attribuer, non seulement un pouvoir, mais aussi un pouvoir qui soit discrétionnaire.»

We believe that if absolute discretion were given to the collector or the judge in the relevant Articles 333, 346 and 347 and as well in Article 327 of the *Code of Penal Procedure*, this would put in doubt and eventually depart from the purpose of the process of attempting, on the one hand, to recover the sums due by direct payment or through compensatory work and on the other, by ordering emprisonment only ultimately when all other measures have proven to be unsuccessful. One cannot imagine for a moment that a collector might arbitrarily decide not to offer compensatory work or not apply for an order of emprisonment. Also, no one would believe that a judge as a matter of personal belief, would not order emprisonment even if confronted with a situation contemplated by Article 347.

Moreover, the legislator has established grounds in each of those Articles which should be acted upon and one could not conceive that either the collector or the judge would refuse to act or act for reasons beyond them.

It may well be that a certain latitude is given in the appreciation of these grounds and this is where the apparent discretion attached to the word «may» finds its application.

When it is stipulated in Article 333 that the collector may offer compensatory work «depending in particular» on its availability, we may hardly infer that these words constitute a key to allow a wide variety of situations to be taken into consideration.

These words are not found in the first part of this Article where the other grounds are spelled out, but rather within the concept of compensatory work to be offered in the second part of the Article.

As such, we believe that the terms «depending in particular» should refer to the compensatory work programs themselves possibly for reasons beyond their availability, for example, regarding the physical or mental aptitude of a defendant to carry out compensatory work. In this sense, the discretion given to the collector might extend to not offering compensatory work to a defendant unable to carry out compensatory work, or if the attitude or behaviour of a defendant renders him ineligible to compensatory work for reasons of security and order, either for a referral agency or for a participating community organization.

Turning now to the role of the collector and the grounds for her decisions, we find that, pursuant to Article 333:

a) the collector must have reasonable grounds to believe that a seizure does not or will not permit the recovery of the sums due;

b) the collector must be convinced that the Defendant is unable to pay;

c) the collector shall verify the availability of compensatory work programs.

The underlining is by the undersigned.

We find that the collector has complied scrupulously with these requirements before informing the defendant that compensatory work programs were not available for her.

As well, pursuant to Article 346, the collector did what she had to do in applying for an order of emprisonment on the ground that «it has not been possible to offer compensatory work» to the defendant.

We believe that the wording of Article 346 entitles the collector to apply for an order of emprisonment even after compensatory work was theoretically available and was offered at one point in time, if it is found out later on, for one reason or another, that it is no longer possible to offer compensatory work either before or while it is being carried out. The cited words in Article 346 «it has not been possible to offer compensatory work», are meant to apply to numerous and various situations where, for example, compensatory work is or rather was available, but may not be offered either totally or partially, before it begins or while it is being carried out, due to the fault of a defendant or due to the fault, refusal or withdrawal of a referral agency or of a

participating community organization, including a temporary lack of need for community work in the bank of the participating community organizations.

Under any of these circumstances, the collector is not bound to evaluate the merit of the reasons why compensatory work may not be offered and will simply refer to the matter to the judge who will then decide what to do in accordance with Article 347. The collector does not sit in appeal of the decisions made by a referral agency or of a participating community organization; his role is not to revise those decisions and he has no authority over them. They are bodies governed by other authorities.

Then, Article 347 comes into play and we find that the judge will not necessarily take a decision on the same grounds and for the same reasons as those explained in Articles 333 and 346. Now, the judge will order the emprisonment of the defendant, only if he is satisfied that the measures provided for in Chapter XIII titled EXECUTION OF JUDGMENTS to recover the sums due do not permit, in this particular case, full recovery of the sums due.

This means that the judge must satisfy himself by a strong preponderance of evidence that the measures do not permit the recovery of the sums due (implicitly by direct payment or through carrying out compensatory work). The legislator has seen fit to use the word «satisfied» in Article 347, compared to the word «convinced» in Article 333. Is the word «satisfied» equivalent to «convinced»? If it is, why then use two different words in so closely related matters? On the

other hand, a simple preponderance of evidence does not seem strong enough to be «satisfied». That is why we conclude that the degree of proof is somewhere between being «convinced» and a «probability» and closer to «convinced».

What are the measures referred to in Article 347, and when do they not permit the recovery of the sums due?

a) the defendant has not paid the sums due in whole or in part (either by direct payment or through compensatory work; a defendant may invoke here that the payment was made and as well the judge must verify the fact that there is a default of payment;

b) the collector had reasonable motives to believe that a seizure would not give results; we believe that the judge is not compelled to hold a full enquiry as to whether or not a seizure would give results and should rely on the apparent reasonable grounds on which the collector has based his decision not to practice a seizure, unless perhaps a defendant (quite unlikely) claims that a seizure should be practiced on a specific relatively valuable asset, before the judge orders his emprisonment;

c) compensatory work was not offered to a defendant because:

    i) the judge is, as well as the collector was, not convinced that the defendant is unable to pay after examining the defendant's financial situation; here again, the judge

should not be compelled to examine the defendant's financial situation and may rely on the allegation of the collector based on reasonable indications that he is not convinced that the defendant is unable to pay, unless perhaps the defendant himself shows his ability to pay and offers a suitable arrangement within the conditions of Article 327, which reads as follows:

> «On application by the defendant, the collector may grant him an extension of time for payment of the sums due if an examination of the defendant's financial situation leads the collector to believe that the defendant can afford to pay them but that an extension of time is justified in the circumstances.»

Incidentally, it may happen that the collector had, and the judge has, reasonable motives to believe that the defendant is able to pay, when, for example, a defendant owns assets or earns money that may not be seized for a reason or another.

ii) there are no compensatory work programs available or it is found that they are not available for the defendant; we are confronted here with the delicate situation where a specific defendant is barred or is expelled from a compensatory work program.

Will this situation be examined by the judge in order to ascertain if the referral agency or the participating community organizations were right or wrong in their decision to bar or expel said defendant? The defendant has suggested that she should be simply discharged if it is shown that the referral agency, the participating organizations or the compensatory work programs may not «work» with her and more particularly if it is not the result of her own fault.

We doubt that the judge has the authority to enquire about the reasons behind a refusal or an expulsion, no more than the collector had, whose duties were confined to simply acknowledging the fact that no compensatory work was available or could be offered.

The referral agency is governed by a contract with the Ministry of Public Security and we presume that the participating community organizations are also governed by contracts, and the collector or the judge do not have the authority to assess if, for example, the obligation as stipulated in those contracts were complied with.

The judge is not entrusted with the authority to dismiss an application for an order of imprisonment when the measures provided for in Chapter XIII were unsuccessful, even if it is claimed that a referral agency or a participating community organization were at fault

in neglecting or refusing to provide for a compensatory work programs either in general or specifically for a given defendant. We would otherwise end up in a situation where a defendant would be discharged while payment of the fine and costs had not been made. If this had been desired by the legislator, it would have been specifically set on. The legislator has created the concept of referral agencies and participating community organizations and their operations are not supervised by the collector or the judge. If compensatory work programs were either inexistant, inadequate or even mismanaged, this does not change the fact that compensatory work may not be offered to a defendant. A collector or a judge confronted with such a situation simply acknowledges the fact and does nothing more, but acts respectively under Articles 346 and 347.

In any event, we were convinced that if the defendant is actually barred from compensatory work programs, she must assume the entire responsibility of this situation and may not blame anyone.

This situation is not dissimilar to another application of Article 346 in that it may eventually be said that the defendant refuses or neglects to carry out compensatory work, if in fact she fails to comply with the instructions given to her by either the referral agency or a participating community organization.

> As we have found no fault, no negligence, no lack of efforts on the part of the YMCA of Montreal in this case and that on the contrary the whole deadlock resulted from defendant's fault and misbehaviour, we find both that compensatory work may not be offered to defendant and that defendant fails or refuses to carry compensatory work within the framework established by the legislator.

As far as the refusal on the part of the defendant to carry out compensatory work at the Domremy Centre, the Honourable Denis BOUDRIAS, acting as a justice of the peace in Municipal Court of Verdun, had commented on this in a judgment rendered on March 28, 1995, in the case of Ville de Verdun c. Daniel Bertrand()

> «Le rôle du Juge saisi d'une telle demande n'est pas de décider à la place du percepteur mais de s'assurer que le percepteur des amendes a bien exercé la discrétion qui est la sienne en vertu de la Loi. L'article 333 du C.P.P. stipule que le percepteur peut offrir des travaux compensatoires. La Loi ne l'y oblige pas. L'article 334 prévoit que c'est le percepteur ou l'organisme designé qui détermine la nature des travaux compensatoires qui seront accomplis par le prévenu. Ces travaux compensatoires constituent une peine en lieu et place d'une peine d'emprisonnement et doivent

> ultimement être considérés comme tels. Il n'appartient donc pas au prévenu de choisir ou de sélectionner les travaux qu'il sera appelé à faire pour satisfaire à la peine qui lui a été imposée."

A similar comment was made by the Honourable Georges SAVOIE, of the Superior Court, in the matter of Jean-Louis Lemaire c. Service d'aide aux prisonniers de Sherbrooke Inc. et als. rendered on December 15, 1983,[()]:

> «De la lecture de ces articles (being the corresponding Articles of the *Summary Convictions Act*), il appert clairement qu'il appartient au perceptcur de déterminer la nature des travaux compensatoires que le défendeur peut s'engager à exécuter.
>
> Il n'appartient donc pas, comme dans le présent cas, au requérant de modifier à son gré, ou selon ses besoins et désirs, les travaux compensatoires déterminés par la personne autorisée à ce faire.»

On the other hand, we do not accept the principle that defendant may be barred on a permanent basis from carrying compensatory work or for such a lengthy period of 5 years, in that each request made by the collector must be treated on its individual merit both by the collector

or the body or organization determined by the collector in accordance with Article 334. In this particular case, the incidents revealed in the evidence were still quite recent and could be considered almost contemporaneous with the two Applications while no indication was shown that the attitude and behaviour of defendant had improved or could improve. It may well be necessary in the future for the referral agency to allow defendant to meet a counsellor so that her good intentions and her aptitude be reassessed.

Finally, it has been suggested that the defendant has accumulated so many statements of offence by violating the Highway Safety Code that she does not deserve to carry out community work.

This argument does not find any basis in the *Code of Penal Procedure*. Nowhere in Chapter XIII, titled EXECUTION OF JUDGMENTS, do we find any reference to either the gravity or the quantity of previous convictions. The legislator has not entrusted the collector or the judge with any investigative authority to explore the past of a defendant.

The only words which may allow a broader interpretation on this subject are found in Article 333 where the collector may or may not offer compensatory work «depending in particular" on the availability of compensatory work programs. Should this mean that the collector may refuse to offer compensatory work in a situation of repeated infractions ?

Concerning the foregoing terms, we have already restricted the discretion of the collector to matters related to the compensatory works and it follows that repeated infractions should not be part of

the reasoning of the collector or the judge. If the legislator had such a scope in mind, it would have been clearly stipulated in the law.

We were quoted by the learned attorney for the Prosecution, the following passage written by the Honourable Louise MAILHOT in the judgment of the Court of Appeal of Quebec in the matter of Suzanne Poirier c. Ville de Lachine and The Procureur Général du Québec[]:

> «Il n'est jamais agréable d'imposer une peine d'emprisonnement.
>
> Il n'est jamais agréable de subir ou de purger une peine d'emprisonnement.
>
> La vie en société a ses lois, a ses contingences, ses obligations et ses devoirs. Parmi les contingences, il y a l'existence de lois et l'existence de sanctions des lois. Parmi ces sanctions, le législateur a prévu des gradations dans les peines selon la gravité de l' infraction, selon également qu'il y a refus ou non d'exécuter un jugement qui impose une peine. Il est une contrainte nécessaire dans une société que des lois existent, qu'elles soient exécutées ou sanctionnées et qu'elles soient respectées. Sinon, c'est la fin de la démocratie, c'est l'anarchie éventuelle. Même si nous sommes loin de cette anarchie ici, il est clair que l'appelante a adopté dans

> les circonstances actuelles une attitude d'entêtement à ne pas vouloir respecter le jugement qui lui impose une amende et qu'elle pourrait payer en exécutant des travaux communautaires qui lui furent offerts.»

In this case, the Defendant admitted herself that she does not want to «work» with the referral agency and has refused an assignment with the Domremy Centre, one of the participating community organizations and has placed herself in a situation where she became unwanted by the referral agency and the participating community organizations.

The collector has established that the amounts due by the Defendant and mentioned in the Applications have not been paid. The collector has shown that it has not been possible to offer compensatory work to the defendant. The collector has shown that the reasons for which it has not been possible to offer compensatory work to the defendant are entirely of the defendant's making. The collector has shown that seizure of defendant's assets will not permit the recovery of the sums due and that she is unable to pay. The collector has shown that the defendant refuses to make any proposal of payment whatsoever which may be reasonably acceptable.

Consequently, the conditions set out in Articles 346 and 347 of the *Code of Penal Procedure* which allow the collector to apply to a judge and the judge to issue an Order of Imprisonment and deliver a Warrant of Committal have been fully satisfied.

Incidentally, the attorney for the Prosecutor submitted excellent written arguments both regarding the facts and the law. We have used certain extracts in the description of the facts of this case.

THEREFORE, FOR ALL THESE REASONS, the Applications made by the collector in these two cases are granted, an Order of Imprisonment of the defendant is issued and a Warrant of Committal shall be delivered.

PIERRE MONDOR
Justice of the Peace

Attorney for the Prosecutor:
Me John Daniel Nolan
(NOLAN LAUZE)

Defendant was not represented by an attorney