Court Martial Appeal Court of Canada

Cour d'appel de la cour martiale du Canada

Date: 20260115

Docket: CMAC-646

Citation: 2026 CMAC 2

CORAM: **GLEASON C.J.**
MACTAVISH J.A.
SCANLAN J.A.

BETWEEN:

HIS MAJESTY THE KING

Appellant

and

CORPORAL L.C. CALDERON

Respondent

Heard at Ottawa, Ontario, on September 26, 2025.

Judgment delivered at Ottawa, Ontario, on January 15, 2026.

REASONS FOR JUDGMENT BY: GLEASON C.J.

CONCURRED IN BY: MACTAVISH J.A.
SCANLAN J.A.

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REASONS FOR JUDGMENT

GLEASON C.J.

[1] The Canadian military justice system differs from the civilian justice system. Both the Supreme Court of Canada and this Court have concluded that many of these differences do not impinge upon the Charter rights of those who are tried in the military justice system: see, for example, *R. v. Edwards*, 2024 SCC 15 at paras. 15, 71, 82 [*Edwards*]; *R. v. Stillman*, 2019 SCC

40, [2019] 3 S.C.R. 144 [*Stillman*] at paras. 44, 113; *R. v. Moriarity*, 2015 SCC 55, [2015] 3 S.C.R. 485 at paras. 36-46, 52-56; *R. v. J.L.*, 2024 CMAC 10 at para. 98; *R. v. Champion*, 2021 CMAC 4 at para. 46; *R. v. Royes*, 2016 CMAC 1, 8 C.M.A.R. 1 at para. 14. One such difference between the two systems involves the existence of a sentencing regime in the military justice system that is distinct from the sentencing regime applied in civilian courts.

[2] In this appeal, the prosecution seeks to set aside long-standing case law and have us conclude that the sentencing options open to courts martial include all the discretionary sentencing options open to civilian courts under the *Criminal Code*, R.S.C., 1985, c. C-46 (the *Criminal Code*), thereby removing an important difference between the military and civilian justice systems. I would decline to do so and would dismiss this appeal.

I. Background

[3] To put the issues in this appeal into context, a little background is necessary. At the time of the incidents giving rise to the charges at issue in this appeal, the respondent held the rank of corporal. While driving a military truck in the course of his duties, the respondent drove at approximately 40 kilometres per hour over the posted speed limit and attempted several drifting manoeuvres on gravel roads on a military base. The last of these manoeuvres was unsuccessful and the truck rolled over, injuring two of its occupants, who were members of the Canadian Armed Forces (the CAF). Their injuries were relatively minor ones. However, the truck was a write-off.

[4] The respondent was charged with two counts of dangerous operation of a motor vehicle causing bodily harm, contrary to section 130 of the *National Defence Act*, R.S.C. 1985, c. N-5 (the *NDA*) and subsection 320.13(1) of the *Criminal Code*, and with two counts of dangerous operation of a motor vehicle, contrary to section 130 of the *NDA* and subsection 320.13(2) of the *Criminal Code*. The dangerous driving causing bodily harm charges were withdrawn and the respondent pled guilty to the dangerous driving charges. The prosecution and defence made a joint sentencing submission, recommending the imposition of a reduction in rank, a reprimand, and a driving prohibition order for one year pursuant to subsection 320.24(4) of the *Criminal Code*.

[5] In reasons reported as *Calderon L.C. (Corporal), R. v.*, 2024 CM 7001, Military Judge Strickey found he did not have jurisdiction to impose the driving prohibition and instead imposed the remaining portions of the joint sentence submission, which both parties agreed would be an appropriate sentence if the Military Judge were to conclude that he lacked jurisdiction to make a driving prohibition order.

[6] The prosecution appeals from the sentence imposed by the Military Judge and submits that he erred in law in finding he lacked jurisdiction to impose a driving prohibition. The respondent disagrees and submits that the Military Judge was correct in concluding that it was not open to him to impose a driving prohibition. The respondent also asserts that, in any event, the sentence imposed was a fit one and in accordance with the joint submission. He thus submits that this appeal should be disallowed pursuant to section 241 of the *NDA*, which provides this

Court discretion to disallow an appeal, if, in its opinion, expressed in writing, there has been no substantial miscarriage of justice.

[7] For the reasons that follow, the Military Judge did not err in finding that he lacked jurisdiction to impose the driving prohibition. Therefore, it is not necessary to address the respondent's arguments involving section 241 of the *NDA*.

II. Relevant Statutory Provisions

[8] It is useful to commence the discussion of the issues that arise in this appeal by laying out the relevant statutory provisions.

[9] Members of the CAF (and in certain circumstances, other persons as well) are subject to the Code of Service Discipline set out in the *NDA*. Offences under the Code of Service Discipline are military offences and include those set out in the *NDA*, the *Criminal Code*, and other Acts of Parliament. In this regard, subsection 130(1) of the *NDA* provides as follows:

Service trial of civil offences	**Procès militaire pour infractions civiles**
130 (1) An act or omission	**130 (1)** Constitue une infraction à la présente section tout acte ou omission :
(a) that takes place in Canada and is punishable under Part VII, the *Criminal Code* or any other Act of Parliament, or	**a)** survenu au Canada et punissable sous le régime de la partie VII de la présente loi, du *Code criminel* ou de toute autre loi fédérale ;
(b) that takes place outside Canada and would, if it had taken place in	**b)** survenu à l'étranger mais qui serait punissable, au Canada, sous

Canada, be punishable under Part VII, the *Criminal Code* or any other Act of Parliament,	le régime de la partie VII de la présente loi, du *Code criminel* ou de toute autre loi fédérale.
is an offence under this Division and every person convicted thereof is liable to suffer punishment as provided in subsection (2).	Quiconque en est condamné encourt la peine prévue au paragraphe (2).

[10] For offences other than murder, manslaughter, or an offence under sections 280 to 283 of the *Criminal Code*, committed in Canada, individuals subject to the Code of Service Discipline may be tried in the military justice system: *NDA*, section 70.

[11] The *NDA* contains numerous provisions governing offences in the Code of Service Discipline, including detailed sentencing provisions. The general provisions in the *NDA* on sentencing lie at the heart of this appeal and are therefore reproduced at length. They read in relevant part as follows:

Service trial of civil offences	**Procès militaire pour infractions civiles**
130 (1) An act or omission	**130 (1)** Constitue une infraction à la présente section tout acte ou omission :
(a) that takes place in Canada and is punishable under Part VII, the *Criminal Code* or any other Act of Parliament, or	**a)** survenu au Canada et punissable sous le régime de la partie VII de la présente loi, du *Code criminel* ou de toute autre loi fédérale ;
(b) that takes place outside Canada and would, if it had taken place in Canada, be punishable under Part VII, the *Criminal Code* or any other Act of Parliament,	**b)** survenu à l'étranger mais qui serait punissable, au Canada, sous le régime de la partie VII de la présente loi, du *Code criminel* ou de toute autre loi fédérale.
is an offence under this Division and every person convicted thereof is liable to suffer punishment as	Quiconque en est condamné encourt la peine prévue au paragraphe (2).

provided in subsection (2).

Punishment

(2) Subject to subsection (3), if a court martial convicts a person under subsection (1), it shall,

(a) if the conviction was in respect of an offence

(i) committed in Canada under Part VII, the *Criminal Code* or any other Act of Parliament and for which a minimum punishment is prescribed, or

(ii) committed outside Canada under section 235 of the *Criminal Code*,

impose a punishment in accordance with the enactment prescribing the minimum punishment for the offence; or

(b) in any other case,

(i) impose the punishment prescribed for the offence by Part VII, the *Criminal Code* or that other Act, or

(ii) impose dismissal with disgrace from Her Majesty's service or less punishment.

Code of Service Discipline applies

(3) All provisions of the Code of Service Discipline in respect of a punishment of imprisonment for life, for two years or more or for less than two years, and a fine, apply in respect of punishments imposed under paragraph (2)(a) or subparagraph (2)(b)(i).

Peine

(2) Sous réserve du paragraphe (3), la peine infligée à quiconque est condamné aux termes du paragraphe (1) est :

a) la peine minimale prescrite par la disposition législative correspondante, dans le cas d'une infraction :

(i) commise au Canada en violation de la partie VII de la présente loi, du *Code criminel* ou de toute autre loi fédérale et pour laquelle une peine minimale est prescrite,

(ii) commise à l'étranger et prévue à l'article 235 du *Code criminel* ;

b) dans tout autre cas :

(i) soit la peine prévue pour l'infraction par la partie VII de la présente loi, le *Code criminel* ou toute autre loi pertinente,

(ii) soit, comme peine maximale, la destitution ignominieuse du service de Sa Majesté.

Application du code de discipline militaire

(3) Toutes les dispositions du code de discipline militaire visant l'emprisonnement à perpétuité, l'emprisonnement de deux ans ou plus, l'emprisonnement de moins de deux ans et l'amende s'appliquent à l'égard des peines infligées aux termes de l'alinéa (2)a) ou du sous-alinéa

(2)b)(i).

…

[…]

Offences under law applicable outside Canada

132 (1) An act or omission that takes place outside Canada and would, under the law applicable in the place where the act or omission occurred, be an offence if committed by a person subject to that law is an offence under this Division, and every person who is found guilty thereof is liable to suffer punishment as provided in subsection (2).

Infractions à l'étranger

132 (1) Tout acte ou omission survenu à l'étranger et constituant une infraction au droit du lieu constitue également une infraction à la présente section, passible, sur déclaration de culpabilité, de la peine prévue au paragraphe (2).

…

[…]

Scale of punishments

139 (1) The following punishments may be imposed in respect of service offences and each of those punishments is a punishment less than every punishment preceding it:

Échelle des peines

139 (1) Les infractions d'ordre militaire sont passibles des peines suivantes, énumérées dans l'ordre décroissant de gravité :

(a) imprisonment for life;

(b) imprisonment for two years or more;

(c) dismissal with disgrace from Her Majesty's service;

(d) imprisonment for less than two years;

(e) dismissal from Her Majesty's service;

(f) detention;

(g) reduction in rank;

(h) forfeiture of seniority;

(i) severe reprimand;

(j) reprimand;

(k) fine; and

(l) minor punishments**.**

a) emprisonnement à perpétuité;

b) emprisonnement de deux ans ou plus;

c) destitution ignominieuse du service de Sa Majesté;

d) emprisonnement de moins de deux ans;

e) destitution du service de Sa Majesté;

f) détention;

g) rétrogradation;

h) perte de l'ancienneté;

i) blâme;

j) réprimande;

k) amende;

l) peines mineures.

Definition of *less punishment*

Interprétation

(2) Where a punishment for an offence is specified by the Code of Service Discipline and it is further provided in the alternative that on conviction the offender is liable to less punishment, the expression ***less punishment*** means any one or more of the punishments lower in the scale of punishments than the specified punishment.

…

Fundamental purpose of sentencing

203.1 (1) The fundamental purpose of sentencing is to maintain the discipline, efficiency and morale of the Canadian Forces.

Objectives

(2) The fundamental purpose of sentencing is to be achieved by imposing just punishments that have one or more of the following objectives:

(a) to promote a habit of obedience to lawful commands and orders;

(b) to maintain public trust in the Canadian Forces as a disciplined armed force;

(c) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;

(d) to deter offenders and other persons from committing offences;

(e) to assist in rehabilitating offenders;

(f) to assist in reintegrating offenders into military service;

(g) to separate offenders, if necessary, from other officers or non-commissioned members or from society generally;

(2) Lorsque le code de discipline militaire prévoit que l'auteur d'une infraction, sur déclaration de culpabilité, encourt comme peine maximale une peine donnée, l'autorité compétente peut lui imposer, au lieu de celle-ci, toute autre peine qui la suit dans l'échelle des peines.

[…]

Objectif essentiel

203.1 (1) La détermination de la peine a pour objectif essentiel de maintenir la discipline, l'efficacité et le moral des Forces canadiennes.

Objectifs

(2) L'atteinte de cet objectif essentiel se fait par l'infliction de peines justes visant un ou plusieurs des objectifs suivants :

a) renforcer le devoir d'obéissance aux ordres légitimes;

b) maintenir la confiance du public dans les Forces canadiennes en tant que force armée disciplinée;

c) dénoncer les comportements illégaux et le tort causé par ceux-ci aux victimes ou à la collectivité;

d) dissuader les contrevenants et autres personnes de commettre des infractions;

e) favoriser la réinsertion sociale des contrevenants;

f) favoriser la réinsertion des contrevenants dans la vie militaire;

g) isoler, au besoin, les contrevenants des autres officiers et militaires du rang ou de la société en général;

(h) to provide reparations for harm done to victims or to the community; and

(i) to promote a sense of responsibility in offenders and an acknowledgment of the harm done to victims or to the community.

h) assurer la réparation des torts causés aux victimes ou à la collectivité;

i) susciter le sens des responsabilités chez les contrevenants, notamment par la reconnaissance des dommages causés à la victime ou à la collectivité.

Fundamental principle of sentencing

203.2 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

Principe fondamental

203.2 La peine est proportionnelle à la gravité de l'infraction et au degré de responsabilité du contrevenant.

Other sentencing principles

203.3 Sentences must be imposed in accordance with the following other principles:

(a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and aggravating circumstances include, but are not restricted to, evidence establishing that

(i) the offender, in committing the offence, abused their rank or other position of trust or authority,

(ii) the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or gender identity or expression, or on any other similar factor,

Principes de détermination de la peine

203.3 La peine est infligée en conformité avec les autres principes suivants :

a) l'adaptation de la peine aux circonstances aggravantes ou atténuantes liées à la perpétration de l'infraction ou à la situation du contrevenant, étant notamment considérés comme des circonstances aggravantes les éléments de preuve établissant que l'infraction, selon le cas :

(i) comporte une utilisation abusive de son grade ou un autre abus de confiance ou d'autorité,

(ii) est motivée par des préjugés ou de la haine fondés sur des facteurs tels que la race, l'origine nationale ou ethnique, la langue, la couleur, la religion, le sexe, l'âge, la déficience mentale ou physique, l'orientation sexuelle ou l'identité ou l'expression de genre,

(iii) the offender, in committing the offence, abused their spouse or common-law partner,

(iv) the offender, in committing the offence, abused a person under the age of 18 years,

(v) the commission of the offence resulted in substantial harm to the conduct of a military operation,

(vi) the offence was committed in a theatre of hostilities,

(vii) the offence was committed for the benefit of, at the direction of or in association with a criminal organization, or

(viii) the offence was a terrorism offence;

(iii) comporte des mauvais traitements infligés par le contrevenant à son époux ou conjoint de fait,

(iv) comporte des mauvais traitements infligés par le contrevenant à une personne âgée de moins de dix-huit ans,

(v) a eu un effet nuisible important sur la conduite d'une opération militaire,

(vi) a été commise sur un théâtre d'hostilités,

(vii) a été commise au profit ou sous la direction d'une organisation criminelle, ou en association avec elle,

(viii) est une infraction de terrorisme;

(b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

b) l'harmonisation des peines, c'est-à-dire l'infliction de peines semblables à celles infligées à des contrevenants pour des infractions semblables commises dans des circonstances semblables;

(c) an offender should not be deprived of liberty by imprisonment or detention if less restrictive punishments may be appropriate in the circumstances;

c) l'obligation, avant d'envisager la privation de liberté par l'emprisonnement ou la détention, d'examiner la possibilité de peines moins contraignantes lorsque les circonstances le justifient;

(c.1) all available punishments, other than imprisonment and detention, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders;

c.1) l'examen, plus particulièrement en ce qui concerne les contrevenants autochtones, de toutes les peines substitutives qui sont raisonnables dans les circonstances et qui tiennent compte du tort causé aux victimes ou à la collectivité;

(d) a sentence should be the least severe sentence required to

d) l'infliction de la peine la moins sévère possible qui permette de

maintain the discipline, efficiency and morale of the Canadian Forces; and	maintenir la discipline, l'efficacité et le moral des Forces canadiennes;
(e) any indirect consequences of the finding of guilty or the sentence should be taken into consideration.	**e)** la prise en compte des conséquences indirectes du verdict de culpabilité ou de la sentence.

[12] In addition to the foregoing, certain provisions in the *Criminal Code* and *NDA* in respect of orders of prohibition and ancillary orders are relevant.

[13] More specifically, subsection 320.24(4) of the *Criminal Code* provides civilian judges sitting under the *Criminal Code* with discretion to impose a driving prohibition following a dangerous driving conviction. The subsection states in relevant part:

Discretionary order of prohibition — other offences	**Ordonnance d'interdiction discrétionnaire — diverses infractions**
(4) If an offender is found guilty of an offence under section 320.13 […], the court that sentences the offender may, in addition to any other punishment that may be imposed for that offence, make an order prohibiting the offender from operating the type of conveyance in question during a period to be determined in accordance with subsection (5).	**(4)** Le tribunal qui inflige une peine au contrevenant déclaré coupable d'une infraction prévue à l'article 320.13, […] peut rendre, en plus de toute autre peine applicable à cette infraction, une ordonnance lui interdisant de conduire le moyen de transport en cause durant la période établie conformément au paragraphe (5).

[14] Many other punishments in the *Criminal Code* are mandatory in nature. One of them is a weapons prohibition order, which is mandatory under section 109 of the *Criminal Code*, following a conviction for one of the offences listed in the section. Under section 113 of the *Criminal Code*, a person subject to or who would be subject to a firearms prohibition order may

apply to have the order lifted or not imposed if they need to use a firearm to hunt or trap to sustain their family or if the order "would constitute a virtual prohibition against employment in the only vocation open to the person". Subsection 109(1) of the *Criminal Code* provides as follows:

Mandatory prohibition order	**Ordonnance d'interdiction obligatoire**
109 (1) Where a person is convicted, or discharged under section 730, of [listed offences] the court that sentences the person or directs that the person be discharged, as the case may be, shall, in addition to any other punishment that may be imposed for that offence or any other condition prescribed in the order of discharge, make an order prohibiting the person from possessing any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, firearm part, ammunition, prohibited ammunition and explosive substance during the period specified in the order as determined in accordance with subsection (2) or (3), as the case may be. [emphasis added]	**109 (1)** Le tribunal doit, en plus de toute autre peine qu'il lui inflige ou de toute autre condition qu'il lui impose dans l'ordonnance d'absolution, rendre une ordonnance interdisant au contrevenant d'avoir en sa possession des armes à feu, arbalètes, armes prohibées, armes à autorisation restreinte, dispositifs prohibés, pièces d'arme à feu, munitions, munitions prohibées et substances explosives pour la période fixée en application des paragraphes (2) ou (3), lorsqu'il le déclare coupable ou l'absout en vertu de l'article 730, selon le cas : [infractions répertoriées] [non-souligné dans l'original]

[15] The *NDA*, on the other hand, contains no provision for driving prohibition orders and in section 147.1 affords discretion to make weapons prohibition orders, which are not mandatory under the *NDA*, unlike under the *Criminal Code*. In addition, subsection 147.1(3) of the *NDA* provides that any firearms prohibition order does not prohibit officers or non-commissioned

members of the CAF from possessing firearms necessary for performance of their duties. Subsection 147.1(1) of the *NDA* states:

Prohibition order	**Ordonnance d'interdiction**
147.1 (1) If a court martial considers it desirable, in the interests of the safety of an offender or of any other person, it shall — in addition to any other punishment that may be imposed for the offence — make an order prohibiting the offender from possessing any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition or explosive substance, or all such things, on convicting or discharging absolutely the offender of [offences omitted] [emphasis added]	**147.1 (1)** La cour martiale doit, si elle en arrive à la conclusion qu'il est souhaitable pour la sécurité du contrevenant ou pour celle d'autrui de le faire, en plus de toute autre peine qu'elle lui inflige, rendre une ordonnance lui interdisant d'avoir en sa possession des armes à feu, arbalètes, armes prohibées, armes à autorisation restreinte, dispositifs prohibés, munitions, munitions prohibées et substances explosives, ou l'un ou plusieurs de ces objets, lorsqu'elle le déclare coupable ou l'absout inconditionnellement, selon le cas : [infractions répertoriées] [non-souligné dans l'original]

[16] Both the *NDA* and the *Criminal Code* contain provisions for ancillary *Sex Offender Information Registration Act*, S.C. 2004, c. 10 [*SOIRA*] orders and orders for taking samples for forensic DNA analysis. The *SOIRA* order provisions in the *NDA* are different from those in the *Criminal Code*: see sections 490.012–490.02911 of the *Criminal Code* as compared to sections 227.01–227.14 of the *NDA*.

III. The Parties' Arguments

[17] The prosecution argues that the text of section 130 of the *NDA* is clear and in subparagraph 130(2)(b)(i) provides discretionary authority to a court martial to impose any punishment open to a judge sitting under the *Criminal Code*, including discretionary punishments like driving prohibition orders for dangerous driving convictions, conditional sentences, and probation orders (none of which are provided for in the *NDA*).

[18] To understand the prosecution's argument, it is useful to repeat subsection 130(2) of the *NDA*:

Punishment	**Peine**
(2) Subject to subsection (3), if a court martial convicts a person under subsection (1), it shall,	**(2)** Sous réserve du paragraphe (3), la peine infligée à quiconque est condamné aux termes du paragraphe (1) est :
(a) if the conviction was in respect of an offence	**a)** la peine minimale prescrite par la disposition législative correspondante, dans le cas d'une infraction :
(i) committed in Canada under Part VII, the *Criminal Code* or any other Act of Parliament and for which a minimum punishment is prescribed, or	**(i)** commise au Canada en violation de la partie VII de la présente loi, du *Code criminel* ou de toute autre loi fédérale et pour laquelle une peine minimale est prescrite,
(ii) committed outside Canada under section 235 of the *Criminal Code*,	**(ii)** commise à l'étranger et prévue à l'article 235 du *Code criminel* ;
impose a punishment in accordance with the enactment prescribing the minimum punishment for the offence; or	

(b) in any other case,	**b)** dans tout autre cas :
(i) impose the punishment prescribed for the offence by Part VII, the *Criminal Code* or that other Act, or	**(i)** soit la peine prévue pour l'infraction par la partie VII de la présente loi, le *Code criminel* ou toute autre loi pertinente,
(ii) impose dismissal with disgrace from Her Majesty's service or less punishment.	**(ii)** soit, comme peine maximale, la destitution ignominieuse du service de Sa Majesté.

[19] The prosecution submits that paragraph 130(2)(a) of the *NDA* requires imposition of the mandatory minimum punishments prescribed in the legislation creating the offence whereas subparagraph 130(2)(b)(i) of the *NDA* affords a court martial discretion to impose any punishment prescribed in Part VII of the *NDA*, the *Criminal Code*, or other legislation, for offences for which no minimum punishment is prescribed. The prosecution reads "prescribed" in this paragraph broadly to mean "contemplated" by the relevant legislation such that the sentencing authority afforded to courts martial would encompass all punishments that could be imposed under the legislation creating the offence. From this, according to the prosecution, it would follow that courts martial may impose the full range of sentences that civilian judges may impose. Thus, according to the prosecution, courts martial possess a wide range of sentencing options, including all those possessed by civilian judges as well as all those listed in the *NDA*. Where there is a difference between the punishments provided in the *NDA* and those provided in the *Criminal Code*, as notably is the case with firearms prohibition orders, the prosecution says that the provisions in the *NDA* must be understood as only applying to purely military offences or, because they are more specific, are to be read as the only punishments applicable under the Code of Service Discipline.

[20] The prosecution argues that the broader context in the *NDA* supports its interpretation, contrasting the wording used by Parliament in paragraph 130(2)(b) of the *NDA* with that used in subsection 132(2) in respect of offences committed outside Canada that are offences under the law of the jurisdiction where they were committed. For the offences governed by subsection 132(2) of the *NDA*, Parliament provided that "the court martial shall impose the punishment in the scale of punishments that it considers appropriate" having regard to the factors listed in the subsection. The prosecution submits that, had Parliament intended to limit military judges to imposing punishments for offences committed in Canada to those listed in section 139 and elsewhere in the *NDA*, it would have used similar wording, confining punishment authority to the scale and type of punishments listed in the *NDA*. In the absence of any such wording, the prosecution argues that the plain wording of subparagraph 130(2)(b)(i) of the *NDA* should govern, which, as noted, the prosecution claims supports its conclusion that courts martial possess discretion to impose the full range of penalties that may be imposed by civilian judges under the *Criminal Code* or other federal legislation.

[21] Finally, the prosecution says that the case law of this Court and of the Supreme Court of Canada that states that sentencing options available in the military justice system are different from those in the civilian system is not binding because the range of sentencing options available to courts martial was not squarely at issue in those cases.

[22] The respondent, on the other hand, underscores that the military and civilian justice systems are different and serve different goals as provided by subsections 203.1(1) and (2) of the *NDA*. The respondent adds that the case law has long recognized the different nature of the

military and civilian justice systems, and that many cases have highlighted that an important difference between the two involves the fact that different sentencing principles apply and that different options are available for sentencing in the two systems.

[23] Turning to the wording of the relevant provisions in the *NDA*, the respondent agrees that paragraph 130(2)(a) of the *NDA* requires imposition by a court martial of a minimum sentence where the provision creating the offence requires the imposition of such a sentence. However, in contrast to the prosecution, according to the respondent, paragraph 130(1)(b) of the *NDA* incorporates the maximum penalties, thereby ensuring that the relevant maximums are the same in the two systems. In support of this reading, the respondent points to the French version of subparagraph 130(2)(b)(ii) of the *NDA* which uses the words "comme peine maximale, la destitution ignominieuse du service de sa Majesté", which, the respondent says, demonstrates that the paragraph sets out the maximum punishments that may be imposed but does not grant sentencing options outside the list of punishments in section 139 and elsewhere in the *NDA*.

[24] More specifically, according to the respondent, paragraph 130(2)(b) of the *NDA* operates to require that a court martial not exceed the maximum punishment established by civilian legislation where it is of greater severity than dismissal with disgrace in the list of punishments in section 139 of the *NDA*. The respondent gives as an example the maximum sentence for sexual assault, which is 14 years in the *Criminal Code*. According to the respondent, the combined effect of subparagraphs 130(2)(b)(i) and (ii) of the *NDA* allows a court martial to impose a sentence of imprisonment of up to 14 years for a sexual assault conviction. Conversely, according to the respondent, for a straight summary conviction offence where civilian legislation

sets an upper limit of 6 months imprisonment, a court martial may impose, but not exceed, the upper limit of dismissal with disgrace from the CAF. According to the respondent, this permits courts martial to impose heavier sentences than civilian judges for offences that are more serious in the military context if they have implications for discipline, efficiency, and morale in the CAF that merit a harsher sentence.

[25] In support of this reading, the respondent points to the inclusion of two punishments in the scale of punishments in section 139 of the *NDA* incorporated into subparagraph 130(2)(b)(ii) of the *NDA* that also appear in the *Criminal Code*: imprisonment for less than two years and fines. According to the respondent, this overlap means that one cannot read subparagraphs 130(2)(b)(i) and (ii) of the *NDA* as setting out two distinct menus from which the court martial may choose, as the prosecution does, because it makes no sense to repeat the same punishments in subparagraphs 130(2)(b)(i) and (ii) of the *NDA*.

[26] The respondent also points to the differing provision on weapons prohibition orders in the *NDA* and *Criminal Code*, noting that paragraph 147.1(1)(d) of the *NDA* states that it applies to offences under the *Criminal Code*, making it clear that the *NDA* contains its own distinct regime for firearms prohibition. From this, the respondent infers that one should understand that all punishments that may be imposed under the Code of Service Discipline are set out in the *NDA*. The respondent also notes the existence of provisions in both the *NDA* and *Criminal Code* on ancillary orders, like *SOIRA* orders and orders for taking samples for forensic DNA analysis, in support of its contention that the *NDA* contains its own, distinct sentencing regime.

[27] Further, the respondent notes that the *NDA* has its own driving-related offences and does not provide for driving prohibition orders. Thus, there is no possibility of imposing a driving prohibition order for a military driving offence. From this, according to the respondent, one should conclude that Parliament did not intend for courts martial to impose driving prohibition orders. The respondent adds that there are practical reasons why this is so, including the lack of regulations to support a driving prohibition and the fact that such prohibition would limit the ability of many CAF members to carry out their duties.

[28] The respondent also argues that the legislative history of the sentencing provisions in the *NDA* support its interpretation. Where additional sentencing powers were required, Parliament amended the *NDA* to incorporate them into the statute, as it did with relatively recent amendments that allow military courts to now impose absolute discharges and intermittent sentences: Bill C-77, *An Act to amend the National Defence Act and to make related and consequential amendments to other Acts*, 1st Sess, 42nd Parl, 2019 (Royal Assent June 21, 2019) at subparas. 63(21)(i) and 63(21)(j) and ss. 63(5) [Bill C-77].

[29] Finally, the respondent submits that any ambiguity in subsection 130(2) of the *NDA* should favour its interpretation, which is more favourable to those accused of offences in the military justice system.

IV. Analysis

[30] I find some of the respondent's arguments persuasive and would interpret paragraph 130(2)(b) of the *NDA* in the way the respondent suggests.

[31] It is well-established that the "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87, quoted in *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27, at para. 21; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559 at para. 26; *La Presse inc. v. Quebec*, 2023 SCC 22 at para. 22). The starting point for the statutory construction exercise is the wording of the provision in issue as "the language of statutory provisions, seen in light of their context and purpose, is the anchor in the statutory interpretation process": *R. v. Allison*, 2025 CMAC 3 at para. 11, citing *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Directrice de la protection de la jeunesse du CISSS A*, 2024 SCC 43, 498 D.L.R. (4th) 316 at para. 24.

A. *Consideration of the text of paragraph 130(2)(b) of the NDA*

[32] A review of the text of paragraph 130(2)(b) of the *NDA* demonstrates that the prosecution's reading of the paragraph cannot stand.

[33] The overlap between the sentencing options in subparagraphs 130(2)(b)(i) and (ii) means that the two provisions cannot be understood as offering two suites of alternatives from which a court martial may choose where there is no prescribed mandatory sentence, as the prosecution suggests. The only way of reconciling the overlap in punishments between subparagraphs 130(2)(b)(i) and (ii) is if one reads subparagraph 130(2)(b)(ii) as setting forth maximum punishments in the manner the respondent submits.

[34] Central to this determination is the presence of the word "or" between subparagraphs 130(2)(b)(i) and (ii) of the *NDA*. The use of this word indicates that the two paragraphs are to be understood as offering different options. As noted by Ruth Sullivan in *The Construction of Statutes*, 7th ed (Toronto: LexisNexis Canada, 2022) [*Construction of Statutes*] at page 98, "[c]ourts often declare that 'and' is conjunctive and 'or' is disjunctive, but to avoid absurdity they must sometimes read 'and' as if it said 'or' — or vice versa". In the present case, no absurdity results from reading the "or" between paragraphs 130(2)(b)(i) and (ii) of the *NDA* disjunctively. Rather, an absurdity would result if "or" were read conjunctively, since it would be redundant to list the same punishments twice. Thus, the text of subparagraphs 130(2)(b)(i) and (ii) of the *NDA* supports the respondent's reading of the provision.

[35] That paragraph 130(2)(b) of the *NDA* sets out maximum penalties is reinforced by the wording in French of subparagraph 130(2)(b)(ii) of the *NDA*, which uses the terms "peine maximale". Under the shared meaning rule of statutory interpretation, the interpretation which is the same in both languages is adopted if it is decisive: Sullivan, *Construction of Statutes*, at pp. 188–99. Although there is no conflict between the English and the French versions of paragraph

130(2)(b) of the *NDA*, the use of the words “maximum penalty” (“peine maximale”) in French supports the reading of the provision as setting forth maximum penalties.

[36] It therefore follows that the text of subsection 130(2) and, in particular, the text in paragraph 130(2)(b), supports the conclusion that the subsection does not afford courts martial sentencing powers to impose discretionary punishments that are absent from the *NDA* and contained only in the *Criminal Code* or another Act of Parliament.

[37] I leave for another day the determination of whether subsection 130(2) (and in particular paragraph 130(2)(a)) of the *NDA* would allow for the imposition of a mandatory punishment prescribed only in the *Criminal Code*, as, for example, would be the case with an impaired driving conviction, which, under the *Criminal Code*, carries a mandatory driving prohibition punishment by virtue of subsection 320.24(1) of the *Criminal Code*. It is sufficient for the purposes of this appeal to hold that subsection 130(2) of the *NDA* does not afford courts martial jurisdiction to impose discretionary penalties set out in other federal legislation that are absent from the *NDA*.

B. *Consideration of the relevant context*

[38] The broader context of the *NDA*, the legislative evolution of the sentencing provisions in the *NDA*, and the case law all support this reading of paragraph 130(2)(b) of the *NDA*.

[39] Turning to provisions elsewhere in the *NDA*, the most significant are those involving weapons prohibitions. Weapons and driving prohibition orders are punishments: *R. v. Poulin*, 2019 SCC 47, [2019] 3 S.C.R. 566 at para. 38; *R. v. Wolfe*, 2024 SCC 34 at para. 36. The different provisions on weapons prohibitions in the *NDA* and *Criminal Code* highlight Parliament's intent that the weapons prohibition punishment be applied differently to those subject to the Code of Service Discipline tried in the military justice system, which makes eminent sense as the duties of many CAF members require the use of firearms. In addition, although not determinative of the interpretive issue in this appeal, the fact that there are separate provisions in the *NDA* and *Criminal Code* for weapons prohibition orders supports the conclusion that the types of sentencing options for those charged in the military justice system are to be found in the *NDA* and not the *Criminal Code*.

[40] Likewise, the presence in the *NDA* of provisions for ancillary *SOIRA* orders and for orders for taking DNA samples for forensic purposes supports the conclusion that the *NDA* contains its own suite of sentencing options. Rather than merely incorporating the provisions in the *Criminal Code* for these sorts of orders, Parliament chose to set them out in the *NDA* and, in the case of *SOIRA* orders, in different terms from those in the *Criminal Code*: see sections 490.012–490.02911 of the *Criminal Code* as compared to sections 227.01–227.14 of the *NDA*.

[41] Similarly, the absence of several discretionary sentencing options in the *NDA* that are present in the *Criminal Code* also supports the conclusion that the types of sentencing options for those charged in the military justice system are to be found in the *NDA*.

[42] I do not see that subsection 132(2) of the *NDA*, relied upon by the prosecution, supports a different interpretation. Contrary to what the prosecution suggests, this subsection is necessary to exclude punishments foreign to Canadian law, that may be in effect in other jurisdictions, such as capital punishment. That is why the subsection is needed to limit the punishments to those listed in section 139 of the *NDA*.

[43] The broader context of the legislative evolution of the sentencing provisions in the *NDA* and the case law from the Supreme Court of Canada and this Court also support this interpretation of paragraph 130(2)(b) and confirms that the *NDA* contains its own distinct sentencing regime.

[44] As the respondent rightly notes, when Parliament wished to provide additional sentencing powers to military tribunals or to clarify how those powers are to be exercised, it made amendments to the *NDA*.

[45] In 1972, to address concerns that those subject to the Code of Service Discipline might not receive sentences for murder commensurate with those for murder committed in Canada, Parliament amended what is now section 130 of the *NDA* to ensure that the minimum sentence for murder under the *Criminal Code* would be imposed by service tribunals for murders committed, tried, and charged outside of Canada.

[46] Prior to the amendments, subsection 119(2) of the 1950 version of the *NDA* provided:

119 (2) Subject to subsection three, where a service tribunal convicts a person under subsection one, the service tribunal shall,	**119 (2)** Sous réserve du paragraphe (3), un tribunal militaire déclarant une personne coupable aux termes du paragraphe (1) doit,
(a) If under Part XII of this Act, the *Criminal Code* or other Act of Parliament of Canada, a minimum penalty is prescribed, impose a penalty in accordance with the enactment prescribing that minimum penalty; or	**a)** si la Partie XII de la présente loi, le *Code criminel* ou une autre loi du Parlement du Canada fixe une peine minimum, infliger une peine conformément à la disposition législative qui prescrit cette peine minimum; ou
(b) in any other case,	**b)** dans tout autre cas,
(i) impose the penalty prescribed for the offence by Part XII of this Act, the *Criminal Code* or that other Act; or	**(i)** infliger la peine prévue pour l'infraction par la Partie XII de la présente loi, le *Code criminel* ou l'autre loi pertinente, ou
(ii) impose dismissal with disgrace from His Majesty's service or less punishment.	**(ii)** infliger la destitution ignominieuse du service de Sa Majesté ou une moindre peine.
(3) All provisions of the Code of Service Discipline in respect of a punishment of death, imprisonment for two years or more, imprisonment for less than two years, and a fine, shall apply in respect of penalties imposed under paragraph (a), or subparagraph (i) of paragraph (b) of subsection two.	**(3)** Toutes les dispositions du Code de discipline militaire visant la peine de mort, l'emprisonnement pour deux ans ou plus, l'emprisonnement pour moins de deux ans et l'amende s'appliquent à l'égard des peines infligées sous le régime de l'alinéa a) ou du sous-alinéa (i) de l'alinéa b) du paragraphe (2).

[47] Subsequent amendments in 1970 to the *NDA* (then, the *National Defence Act*, R.S.C. 1970, c. N-4) led to section 120(2) of the *NDA* (as the provision was renumbered), which read as follows:

120 (2) Subject to subsection (3), where a service tribunal convicts a	**120(2)** Sous réserve du paragraphe (3), un tribunal militaire déclarant une

person under subsection (1), the service tribunal shall,

(a) if the conviction was in respect of an offence committed in Canada, and under Part XII of this Act, the *Criminal Code* or other Act of Parliament of Canada, a minimum penalty is prescribed; or

(b) in any other case,

(i) impose the penalty prescribed for the offence by Part XII of this Act, the *Criminal Code* or that other Act; or

(ii) impose dismissal with disgrace from His Majesty's service or less punishment.

personne coupable aux termes du paragraphe (1) doit,

a) si la déclaration de culpabilité est relative à une infraction commise au Canada et si, en vertu de la Partie XII de la présente loi, du *Code criminel* ou d'une autre loi du Parlement du Canada, une peine minimum est prescrite, infliger une peine conformément à la disposition législative qui prescrit cette peine minimum ; ou

b) dans tout autre cas,

(i) infliger la peine prévue pour l'infraction par la Partie XII de la présente loi, le *Code criminel* ou l'autre loi pertinente, ou

(ii) infliger la destitution ignominieuse du service de Sa majesté ou une moindre peine.

[48] In 1972, clause 73 of Bill C-2, *An Act to amend the Criminal Code and to make related amendments to the Criminal Code 1967 Amendment Act, the Criminal Records Act, the National Defence Act, the Parole Act and the Visiting Forces Act*, 4th Sess, 28th Parl, 1972, modified paragraph 120(2)(a) of the *NDA* to the following:

73. Paragraph 120(2)(a) of the *National Defence Act* is repealed and the following substituted thereof:

"(a) if the conviction was in respect of an offence

(i) committed in Canada, under Part XII of this Act, the *Criminal Code* or any other Act of the Parliament of Canada and for which a minimum punishment is prescribed, or

73. L'alinéa 120(2)a) de la *Loi sur la défense nationale* est abrogé et remplacé par ce qui suit:

« a) si la déclaration de culpabilité est relative à une infraction

(i) commise au Canada, sous le régime de la Partie XII de la présente loi, du *Code criminel* ou de toute autre loi du Parlement du Canada, et pour laquelle une peine minimum est

	prescrite, ou
(ii) committed outside Canada under section 218 of the *Criminal Code*,	(ii) commise hors du Canada sous le régime de l'article 218 du *Code criminel*,
impose a punishment in accordance with the enactment prescribing the minimum punishment for the offence; or"	infliger une peine en conformité de la disposition législative qui prescrit la peine minimum pour l'infraction ; ou, »

[49] Government speakers stated as follows before the House of Commons Standing Committee on Justice and Legal Affairs when the proposed amendments were being studied:

> **Mr Lang**: Mr. Chairman, the proposed amendment will ensure that on conviction for murder a serviceman will be sentenced to punishment for that offence prescribed in the Criminal Code.
>
> **Mr. Christie**: Under the National Defence Act as it is now framed, you could, on a conviction for murder, impose a reprimand. It is just and oversight in the drafting of the National Defence Act that we are rectifying here.
>
> ("Bill C-2, An Act to amend the Criminal Code and to make related amendments to the Criminal Code 1967 Amendment Act, the Criminal Records Act, the National Defence Act, the Parole Act and the Visiting Forces Act", House of Commons, Standing Committee on Justice and Legal Affairs, Minutes of Proceedings and Evidence, 28-4, No 7 (11 May 1972) at 7:36 (The Honourable Otto Lang and Donald H. Christie)).

[50] Again in 2019, Parliament amended the *NDA* to include absolute discharge and intermittent sentences as sentencing options in the *NDA*: Bill C-77. The *Criminal Code* already contained provisions allowing for imposition of absolute discharges and intermittent sentences: see subsections 730(1) and 732(1) of the *Criminal Code.* The amendments to the NDA made in 2019 aligned with recommendations and criticisms made in reports submitted to the Minister of National Defense: see The Honourable Patrick J. LeSage, *Report of the Second Independent Review Authority to The Honourable Peter G. MacKay Minister of National Defence*, submitted

to the Minister of National Defence (December 2011), [*LeSage Report*] at p. 26, see also Recommendation 13; The Right Honourable Antonio Lamer P.C., C.C., C.D., *The First Independent Review by the Right Honourable Antonio Lamer P.C., C.C., C.D. of the provisions and operation of Bill C-25, An Act to amend the National Defence Act and to make consequential amendments to other Acts, as required under section 96 of Statutes of Canada 1998, c.35*, submitted to the Minister of National Defence (3 September 2003), at p. 65, see also Recommendation 52.

[51] The 2019 amendments to the *NDA* to provide military judges with the sentencing options of absolute discharge and intermittent sentences would not have been required if paragraph 130(2)(b) of the *NDA* were to be interpreted in the way the prosecution suggests, as under its interpretation, the jurisdiction to impose these sentences would already have been vested in military judges. As noted by Sullivan at page 629 (*Construction of Statutes*), although the presumption may be rebutted,

> [i]t is presumed that amendments to the wording of a legislative provision are made for some intelligible purpose: to clarify meaning, to correct a mistake, to change the law. A legislature would not go to the trouble and expense of amending a provision without any reason.

[52] Thus, the legislative history of the sentencing provisions in the *Criminal Code* supports the interpretation that paragraph 130(2)(b)(i) of the *NDA* does not import all the sentencing provisions in the *Criminal Code* into the Code of Service Discipline.

[53] The case law also supports the respondent's position that the military justice system is different from the civilian justice system and encompasses distinct sentencing provisions and principles. The case law of the Supreme Court of Canada and of this Court are replete with examples of where these points are made and where the Courts have accepted that courts martial are limited to the sentences set out in the *NDA*. Contrary to what the prosecution asserts, these statements cannot be relegated to non-binding comments.

[54] For example, in *Stillman*, the Supreme Court underscored that offences under the *Criminal Code* or other statutes become offences under military law when committed by those who are subject to the Code of Service Discipline and tried by a military tribunal. The Court noted that military offences are sentenced differently than offences tried in a civilian court. In rejecting the requirement of a military nexus before offences may be tried before a military tribunal, Justices Moldaver and Brown, writing for the majority, stated at paragraphs 100–101:

> [100] … were serious civil offences committed by persons subject to the CSD to be streamed into the civilian justice system, sentencing decisions in those cases might not truly account for the seriousness of such offences, seen in light of the purposes of discipline, efficiency, and morale. As Cattanach J. recognized in *MacKay v. Rippon*, 1977 CanLII 3028 (FC), [1978] 1 F.C. 233 (T.D.), "[m]any offences which are punishable under civil law take on a much more serious connotation as a service offence and as such warrant more severe punishment" (p. 236, quoted in *Généreux*, at p. 294). The proper maintenance of military discipline, efficiency, and morale may require a more severe response to misconduct than it would receive in the civilian justice system. Indeed, the fundamental purposes of sentencing in the military justice system differ from those in the civilian criminal justice system. These purposes, set out in s. 203.1(1) of the *NDA*, are (a) "to promote the operational effectiveness of the Canadian Forces by contributing to the maintenance of discipline, efficiency and morale"; and (b) "to contribute to respect for the law and the maintenance of a just, peaceful and safe society". Furthermore, s. 203.1(2) of the *NDA* stipulates that these purposes "shall be achieved by imposing just sanctions that have one or more of the following objectives":

> (a) to promote a habit of obedience to lawful commands and orders;
>
> (b) to maintain public trust in the Canadian Forces as a disciplined armed force;
>
> (c) to denounce unlawful conduct;
>
> (d) to deter offenders and other persons from committing offences;
>
> (e) to assist in rehabilitating offenders;
>
> (f) to assist in reintegrating offenders into military service;
>
> (g) to separate offenders, if necessary, from other officers or non-commissioned members or from society generally;
>
> (h) to provide reparations for harm done to victims or to the community; and
>
> (i) to promote a sense of responsibility in offenders, and an acknowledgment of the harm done to victims and to the community.

> [101] While some of these objectives are reflected in s. 718 of the *Criminal Code* (e.g., rehabilitating offenders), others are not (e.g., promoting a habit of obedience to lawful commands and orders). Thus, sentencing in the military justice system is guided by certain objectives that are unique to the military milieu.
>
> [emphasis added]

[55] In discussing the factual background in *Stillman*, the majority at paragraph 51 noted that the *LeSage Report* had recommended a "…comprehensive review of the sentencing provisions of the *NDA*, with a view to making these provisions more closely mirror the flexible range of punishments in the civilian criminal justice system". This statement would not have been made (nor the *LeSage Report* recommendation, itself, been made) if a flexible range of punishments were already incorporated into paragraph 130(2)(b)(i) of the *NDA* in the manner the prosecution suggests.

[56] To somewhat similar effect, in *Edwards* at paragraph 61, Justice Kasirer, writing for the majority, described the sentences that may be imposed by a military tribunal on those subject to the Code of Service Discipline in the following terms:

> [m]embers who are found guilty of service offences may be subject to a range of sanctions ranging in severity from minor punishments to imprisonment for life (*NDA*, s. 139). The available sentences include dismissal from service with disgrace and dismissal without disgrace (s. 139(1)(c) and (e)).

[57] Notably, Justice Kasirer made no mention of sentencing options that exist only in the *Criminal Code.*

[58] This Court has also highlighted the differing sentencing provisions available to military tribunals under the Code of Service Discipline.

[59] In *R. v. Dixon*, 2005 CMAC 2, 7 C.M.A.R. 4, Justice Létourneau, writing for the Court stated at paragraphs 21–22:

> [21] Of course, many of these sentences imposed by civilian courts are not available to military judges. The range of sentences authorized by section 139 of the Act does not include absolute or conditional discharge, conditional sentences, suspended sentence, imprisonment served in the community or probation. …
>
> [22] As a matter of fact, former Chief Justice Lamer, who conducted the first independent review of the functioning of Bill C-25 that amended the *National Defence Act*, recommended that a more flexible range of punishments and sanctions be made available to military courts as is available under the civilian criminal justice system: see *The First Independent Review of the provisions and operation of Bill C-25, An Act to amend the National Defence Act and to make consequential amendments to other Acts*, September 3, 2003, pages 65 and 66.
>
> [emphasis added]

[60] Similarly, in *R. v. Trépanier*, 2008 CMAC 3, 7 C.M.A.R. 180, this Court stated:

> [33] The transformation of *Criminal Code* offences into military offences by making them service offences through sections 2 and 130 of the NDA is not without consequences for a person accused before a military tribunal. A number of derogations and loss of rights and benefits ensues.
>
> […]
>
> [36] An accused convicted by a court martial for *Criminal Code* offences is also deprived of a variety of sentences which would be available to him if he or she were tried before a civilian court. Absolute discharge (section 730 of the *Criminal Code*), conditional discharge (*ibidem*), condition sentences whereby the sentence of imprisonment is served in the community (section 742.1 of the *Criminal Code*), conditional sentence order (section 742.3 of the *Criminal Code*), intermittent sentence (section 732 of the *Criminal Code*) and suspended sentence with probation (section 731 of the *Criminal Code*) are not part of the range of sentences that a court martial can impose pursuant to section 139 of the *NDA*: see *Dixon v. Her Majesty the Queen*, supra, at paragraphs 21 and 22.
>
> [emphasis added]

[61] In *R. v. Ellis*, 2010 CMAC 3, 7 C.M.A.R. 433, the constitutionality of the sentencing regime in the *NDA* was challenged and found to be valid. In describing that regime, Justice Létourneau, again writing for the Court, noted at paragraph 24:

> [24] While the Code of Service Discipline over the years has extended its scope of application to all civilian offences, except murder, manslaughter and the abduction of children when these offences are committed in Canada (see section 70 of the Act), the range and scale of punishments provided by section 139 of the Act have not followed and benefited from the evolution of the sentencing options now available to civilian courts.

[62] In *R. v. Darrigan*, 2020 CMAC 1, 8 C.M.A.R. 406, the prosecution argued that the military judge had erred in applying this Court's military jurisprudence rather than following

certain civilian sentencing precedents. This Court disagreed. Writing for the Court, Justice Saunders stated at paragraphs 26–27 and 33:

> [26] I will begin my analysis by emphasizing the importance of a separate system of military justice in preserving discipline, efficiency and morale. This function is of course essential in maintaining a state of readiness on the part of the Canadian Armed Forces in the defence of our nation's security. Respectfully, the Crown's attachment in this appeal to the civilian model of sentencing ignores the fundamental role of Canada's military and the disciplinary code which binds its members.
>
> [27] In a long line of cases, the Supreme Court has provided clear and consistent direction with respect to the significance and necessity of a separate system of justice required to maintain the morale, discipline and efficiency of our Canadian Armed Forces.
>
> [Discussion of the case law omitted]
>
> [33] The first and most obvious is the different statutory regime within which the prosecution chose to proceed with its charges against PO2 Darrigan. Having made that choice, the procedures and penalties relevant to the prosecution of PO2 Darrigan are codified in "Part III, Code of Service Discipline" commencing at s. 60 of the NDA. Following his guilty pleas, the sentencing provisions found in "Division 7.1 Sentencing" were triggered. Here we see some very significant differences in the approach taken to sentencing when comparing the military and civilian justice systems.
>
> [emphasis added]

[63] From the foregoing, it is apparent that the approach of the prosecution in the instant appeal contradicts a long line of case law, holding that the sentencing options open to courts martial are found in the *NDA* and are different from those in the *Criminal Code*.

[64] Thus, the contextual factors all support the conclusion that paragraph 130(2)(b) of the *NDA* does not provide authority to impose discretionary punishments that are not found in the *NDA* but only in the *Criminal Code* or other federal legislation.

C. *Consideration of the purpose of the provisions at issue*

[65] The purpose of the provisions at issue, and indeed, of the entire Code of Service Discipline, is to maintain the discipline, efficiency, and morale of the CAF as is expressly stated in section 55 and subsection 203.1 of the *NDA* and as was noted, for example, in *Stillman* at paragraph 35, *Moriarity* at paragraph 46, and *R. v. Généreux*, [1992] 1 S.C.R. 259 at page 293. The case law makes it clear that this purpose is served by the distinct sentencing regime that applies in the military justice system, as the above citations illustrate. This purpose is served by the interpretation of paragraph 130(1)(b) of the *NDA* that I have determined appropriate and would not be served by the interpretation proposed by the prosecution.

[66] Hence, the text, context, and purpose of the provisions at issue lead to the conclusion that the Military Judge correctly interpreted his sentencing authority and that this appeal must be dismissed.

V. Proposed Disposition

[67] For these reasons, I would dismiss this appeal.

"Mary J.L. Gleason"
Chief Justice

"I agree.
Anne L. Mactavish J.A."

"I agree.
John E. Scanlan J.A."

COURT MARTIAL APPEAL COURT OF CANADA

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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