COURT MARTIAL

Citation: *R. v. Allison,* 2024 CM 5018

Date: 20240918
Docket: 202401

Standing Court Martial

Canadian Forces Support Unit Europe
Geilenkirchen, Germany

Between:

His Majesty the King

- and -

Civilian D.E. Allison, Offender

Before: Captain(N) C.J. Deschênes, C.M.J.

REASONS FOR SENTENCE

(Orally)

I. Introduction

[1] On 16 September 2024, the offender, Mr Allison, a civilian, was found guilty by a Standing Court Martial (SCM) of one charge laid pursuant to section 130 of the *National Defence Act* (*NDA*), for an act punishable under the *Criminal Code*, that he operated a conveyance while impaired in Casteau, Belgium, on or about 19 December 2022, contrary to paragraph 320.14(1)(a). The offender committed the infraction while he was living in Belgium with his spouse, who is a Canadian Armed Forces (CAF) member posted to Europe since July 2022.

[2] The evidence at the trial revealed that on or about 19 December 2022, International Military Police (IMP) officer Brigadier Scarselli was patrolling the Supreme Headquarters Allied Powers Europe (SHAPE) area when he noticed around 2230 hours a vehicle that had one of its doors opened. The vehicle was parked in a parking lot across from a bar called B3. After parking his police car in proximity,

Brigadier Scarselli approached the vehicle, and saw an individual who appeared to be asleep, seated in the driver seat. After waking the individual, Brigadier Scarselli detected a strong odour of alcohol coming from him. The latter, who was later identified as Mr Allison, denied being drunk and told the officer he needed to go home immediately. The offender then attempted to insert his car key in the ignition to set the vehicle in motion. After confiscating the keys and calling for support, Brigadier Scarselli and the officers who arrived a few minutes later, attempted to identify the offender and contact his sponsor so he could be safely taken home. Two of the three officers who intervened at the scene were called to testify and reported observing the offender displaying clear signs of severe alcohol-induced intoxication. They described observing limited motor skills, slurred or strange speech, difficulties standing up by himself, amongst other symptoms. The offender was eventually driven home by two of the officers once he was identified, an address for his residence was found, and a confirmation that his spouse was unreachable. The evidence of severe intoxication, and of alcohol consumption by the offender, were corroborated by an off-duty IMP who had observed the offender drinking earlier at the B3. The Court found that the prosecution proved beyond reasonable doubt, all the elements of the offence, as the evidence, which remained generally unchallenged, was found credible and reliable.

[3] The Court must now determine a fair and fit sentence to impose in the circumstances. In this context, it must also determine whether the Court has authority to impose a three-year driving prohibition order on a civilian offender.

II. Facts relevant to the determination of a sentence

Military Impact Statement

[4] As part of its determination of an appropriate sentence to impose, the Court considered the evidence adduced at the trial and that it accepted as conclusive evidence. The prosecution also provided a military impact statement signed by Lieutenant-Colonel (LCol) Chateauneuf, the Canadian Commanding Officer in Casteau South-West for the SHAPE. LCol Chateauneuf wrote that the unit in the SHAPE is unique in various ways, specifically as it pertained to the fact that civilian dependents of CAF members are also subject to the Code of Service Discipline while living in Belgium. She explained hearing skeptic comments from members of the Canadian community regarding the outcome of these trial proceedings and whether they would even take place. She wrote that the proceedings of this court martial occurring in Europe are already sending “a wave through the CAF OUTCAN community in Formation Europe” which will “certainly help with deterrence in the future”. She expressed her confidence that the sentencing will impact discipline, efficiency, and morale, restore trust in the disciplinary system and will teach valuable lessons to the kids of the community; that actions have consequences.

Circumstances of the Offender

[5] As for the personal situation of the offender, since Mr Allison is a civilian, the prosecution was unable to provide the documents they are normally required to provide in accordance with article 111.17 of the *Queen's Regulations and Orders for the Canadian Forces* (QR&O). However, I was provided with a Canadian Police Information Centre (CPIC) print out of his prior convictions, evidence that was admitted by the defence.

[6] Further, through his testimony, Mr Allison provided useful information regarding his background and present circumstances. He served thirty-nine years in the CAF and retired before his move to Belgium in July 2022. He joined the CAF in 1983 as a radio technician and commissioned in 1990 serving as a logistics officer for five years, then changed his military occupation to Public Affairs Officer (PAO), serving in this capacity for twenty-seven years. During his military career, he deployed to Bosnia in 1998 and 2000.

[7] He committed his first impaired driving related offence in 1989 when he was twenty-eight years old. He did not plead guilty to the charge and after a contested trial, was sentenced to a $450 fine. He also did not plead guilty to the second set of related offences in 1993. He was found guilty of both charges and sentenced to a $300 fine, a three-months' probation, and a one-year driving prohibition. In 2004, he pled guilty to another related charge, failing or refusing to provide a sample and sentenced to a $1,000 fine and twelve-months' driving prohibition. The offender explained that at the time of the commission of these offences he was single and did not realize he had issues with alcohol abuse.

[8] He is now sixty-three years old and has been married for eighteen years to a PAO serving in the SHAPE. They have four children aged eighteen, sixteen, twelve, and seven years old. The oldest child is attending college in Canada, while the others live with the couple in Belgium.

[9] Since he arrived in Belgium in 2022, he is a stay-at-home dad, taking care of household chores including cooking, cleaning, and driving his children to sports practice and other activities. He testified feeling very proud when his wife was selected to serve as the SHAPE PAO for a three-year posting, a posting considered high profile. When they moved to Belgium, he was looking forward to the next chapter in their lives. While he enjoys his time at home with his children, unfortunately, Mr Allison is not happy in Belgium, for several reasons. One was that there were tensions with his wife; they were arguing almost constantly. Another is that he developed a dislike for the attitude of Belgian people. Additionally, he could not find employment opportunities to apply for as they were looking for candidates proficient in French, which he is not. He told the Court he was too busy with chores at home to take French training.

[10] Mr Allison is also currently dealing with a medical condition that he finds particularly terrifying. In August or September 2023, he noticed he was slurring and sometimes searching for his words, but he ignored the issue. It was at the insistence of his wife that he finally consulted with health care professionals later in 2023 or early

2024 to understand the reason for his speech impediment. He was seen by Dr Sorensen, a doctor in the SHAPE. Because Dr Sorensen suspected that Mr Allison had aphasia, he referred him for testing. The offender had blood tests done and was referred to a neurologist who conducted an MRI. None of these investigative methods were conclusive or proved that he had any underlying medical condition. Since Dr Sorensen was posted in the meantime, and their replacement is still not in post yet, Mr Allison is awaiting further referrals to continue the medical investigations into his condition. He is due for more neurologist testing or consults to be scheduled but does not know when this follow-up will take place. He testified that since then, his condition has deteriorated. Now, he cannot carry a conversation with his family, and day-to-day encounters are awkward. During his testimony, it was apparent that he faced some challenges answering counsel's questions.

[11] He described that on 19 December 2022, he was physically and mentally exhausted, feeling depressed, concerned that his marriage was breaking up. He was not sleeping. He attended the B3 all day and evening to participate in a regular dart tournament at the bar. He explained that he was crying during the evening because another attendee mentioned Christmas, and he was not sure if he would spend Christmas again with his family. He eventually admitted he consumed too much alcohol that night. When it was suggested that he was drowning his sorrows, he responded that he "does not see it that way". He explained that when he arrived at his house with the IMP, his spouse was furious. His children were confused upon learning of him being driven back home in a police car. Since then, he cut back his drinking.

[12] Mr Allison sought assistance for his alcohol abuse for the first time when he was served with the documents in relation to these proceedings in July 2023. This is when he called a family meeting and pledged to his family he would stop drinking. After some discussions with his wife, they decided that it would be good for him to attend Alcoholics Anonymous (AA) meetings, which he did at a local church starting in August or September 2023, for about three months. He received two coins, each representing one month of sobriety. He decided to stop attending the meetings because they were "prelatizing". There was a strong religious component to the meetings that he did not like because AA links success to a higher power; God. Mr. Allison rejects this belief in God. His higher power is his family. He acknowledged, in this context, that he caused harm to his family through the humiliation he brought to his wife and children. He believes he made a foolish decision that evening.

[13] He explained that he did not know he was an alcoholic when he was convicted in the past, but looking back, he realizes it now, admitting that he has a long standing of alcohol abuse, spanning almost four decades. He had issues with drinking during his marriage and does not recall if his wife suggested he should get help, or if he disregarded her requests. They fought occasionally about his drinking, but he never took it upon himself to seek help in the past. He does not know what his triggers are to abuse alcohol, because he "did not have this conversation" with himself.

III. The determination of a fair and fit sentence to impose in the circumstances.

Positions of parties

[14] The prosecution recommended imprisonment for a period of thirty days to be served in Ottawa because the current legal construct, the North Atlantic Treaty Organization Status of Forces Agreement (NATO SOFA) and paragraph 114.06(3) of the QR&O, do not align in the circumstances of a civilian offender living in Belgium and tried in Germany to be incarcerated here in Europe. The prosecution is not seeking the imposition of the minimum punishment provided for in the *Criminal Code* that attracts longer periods of incarceration. The prosecution also recommends a three-year driving prohibition order.

[15] It is the prosecution's view that a shorter period of incarceration is the minimum punishment and would serve to address general and specific deterrence, which should be the most important objectives for this punishment, considering the twenty-year gap that has elapsed since the last conviction. The prosecution contended that, although this gap should be given some weight, incarceration is still required in the circumstances. The offender's testimony demonstrated further that Mr Allison is still a danger to society, as he still poses a risk to operate or drive a vehicle while impaired because he only took limited steps to address his alcohol abuse. The prosecution also submitted that the offender only disavowed his struggle with alcohol after being charged. His own resolve is an unreliable safety net considering his past, therefore he should be seen as a continued risk to society, a serial offender.

[16] As for the driving prohibition order, the prosecution contended that Parliament's intent with section 130 of the *NDA*, was to ensure parity of punishment with the principles drawn from case law from both courts martial and courts of criminal jurisdiction. Since the Supreme Court of Canada (SCC) has recently established that a driving prohibition order is deemed to be a punishment, courts martial have authority to issue this mandatory order as a punishment. They further contended that section 175, a newer provision, was aimed at fixing issues with respect to the scale of punishments regarding civilian offenders, but it was not to remove jurisdiction to impose a component of a *Criminal Code* punishment. Otherwise, it would confer a clear advantage to civilian offenders, which is inconsistent with Parliament's intent.

[17] Conversely, the defence contended that both the French and English versions of section 175 of the *NDA* are clear. This section limits the power of punishment of an SCM on a civilian offender, therefore a court martial does not have authority to order a driving prohibition. When the law is clear, no interpretation is required. There is no jurisprudence that would confirm the approach suggested by the prosecution; courts martial that have tried similar offences did not address the issue. Since the power to impose a driving prohibition order is not specifically provided for in the *NDA*, this power does not exist in the military justice context for a civilian offender. The defence further contended, that based on previous court martial decisions, section 179 is not an authority to impose a driving prohibition.

[18] With regard to the appropriate sentence to recommend, the defence suggested that the Court impose a $3,000 fine. Mr Allison did serve his country for thirty-nine years. He went through some hardship with his medical condition, and depressive mood, unable to find employment in Belgium. He does not drink alcohol anymore; he is no longer a danger. His situation has been hard on him, he feels shame. He took steps to address his alcohol abuse. He does not want to lose his family, to which he pledged he would stop drinking. His convictions date back to before he started his family. There is a lengthy gap since the last conviction, and he was not driving the night in question. A $3,000 fine would achieve general deterrence. This punishment would assist him in his rehabilitation.

Sentencing principles of the military justice system

[19] In determining a punishment to impose, I must apply the principles a sentencing judge must follow when determining a fair and fit sentence. The Court must be guided by the sentencing principles contained in the *NDA*, as provided at section 203.1, "The fundamental purpose of sentencing is to maintain the discipline, efficiency and morale of the Canadian Forces."

[20] The fundamental purpose of sentencing is to be achieved by imposing just punishments that have one or more of the objectives listed in the *NDA*, such as to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct; to deter offenders and other persons from committing offences, or to assist in rehabilitating.

[21] When imposing a punishment, a sentencing judge must also take into consideration other statutory principles to include that a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender; and that it should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances. These principles are very similar to those contained in the *Criminal Code.*

[22] The punishment imposed by any tribunal should constitute the minimum necessary intervention that is adequate in the circumstances. For a court martial, this means imposing a sentence composed of the minimum punishment necessary to achieve the fundamental purpose of sentencing. In the end, a sentence must be proportionate to the circumstances surrounding the commission of the offence and to the responsibility of the offender.

[23] It is rare that a court martial has to impose a punishment for an offender found guilty of an offence related to driving or operating a vehicle while impaired. In this context, for some, particularly those who are less familiar with the reality of the CAF, the prosecution of an offence-related impaired driving in the military justice system seems to have a tenuous link with the fundamental purpose of sentencing of maintaining the discipline, efficiency and morale of the CAF. That is not the case. As recognized in *R. v. Master Corporal D.W. Deans*, 2024cm1008, the connection between discipline and this type of offence is twofold: "members of the military must be committed to

observe the laws of Canada; and secondly, and in relation to this particular offence, the nature of the offence shows a disregard for the safety of other members of society. And the safety of Canadians is one of the *raison d'êtres* of the Canadian Forces", at paragraph 13. This excerpt from the *Deans* decision in relation to safety of other members of society aligns with Parliament's intent in this regard which is encapsulated at paragraph 320.12(b) of the *Criminal Code*:

> (b) the protection of society is well served by deterring persons from operating conveyances dangerously or while their ability to operate them is impaired by alcohol or a drug, because that conduct poses a threat to the life, health and safety of Canadians;

[24] In addition, even more exceptional is a court martial held to try a civilian accused. In modern day, I am aware of only one other case. That said, although the general intent for providing military jurisdiction over civilians who accompany the forces was to protect their interests to be tried according to our law (see *R v Wehmeier*, 2012 CM 1007), "[t]he Code serves a public function as well by punishing specific conduct which threatens public order and welfare. [. . .] Service tribunals thus serve the purpose of the ordinary criminal courts, that is, punishing wrongful conduct, in circumstances where the offence is committed by a member of the military or other person subject to the Code of Service Discipline." G*énéreux*, [1992] 1 S.C.R. 259, at paragraph 31. [My emphasis.]

[25] In addition to serving a public function, I believe that, to a certain extent, the exercise of miliary jurisdiction over civilians accompanying the forces abroad may also serve to maintain the discipline, efficiency and morale of the CAF. Civilians accompanying the CAF become part of a very small community, where its members generally know each other, or of each other. These civilians also represent our country. They are expected to hold the values of Canadian society and abide by its law, by being subject to the Code of Service Discipline. No doubt that the absence of intervention of the military justice system for the commission of an alleged infraction, would impact the morale and discipline of CAF members of such a small community.

[26] Having addressed the sentencing principles in the military justice system, I must now turn to the relevant provisions of the *Criminal Code* related to the offence of operating a conveyance while his ability to do so was impaired.

[27] Section 320.19 provides for minimum punishments to impose for this offence. For a first offence, the Court must impose a fine of $1,000. For a second offence, imprisonment for a term of thirty days, and for each subsequent offence, imprisonment for a term of 120 days. When the punishment is to be determined for a second offence or more, in order to trigger these minimum penalties, before the accused enters a plea, the prosecution must give notice of its intention to seek a greater penalty by reason of prior convictions. In this case, the prosecution chose not to give notice, and it is not seeking the minimum punishment to be imposed for a fourth offence.

[28] Courts martial have established in older cases (*Deans* and *R. v. Mantha*, (13 June 2000), CM 32/00 (unreported)) that, as a common practice, all second offenders

went to jail for fourteen days, presumably because at that time, it was the minimum punishment provided for in the *Criminal Code* in those circumstances. In *Deans*, it was found that courts martial are not necessarily bound by the minimum sentences of the *Criminal Code* for these types of offences, because of the wording of section 130 of the *NDA*. Indeed, this section provides that an act or omission that takes place outside Canada and would, if it had taken place in Canada, be punishable under the *Criminal Code*, is an offence under the *NDA*. The Court shall then impose a punishment in accordance with the enactment prescribing the minimum punishment for an offence under section 235 of the *Criminal Code* offence (murder when committed outside of Canada); in any other case, it is the punishment prescribed for the offence by the *Criminal Code*. This means that the court is only statutorily bound by the minimum punishment of the offence of murder when taken place outside Canada, not by any other minimum punishment for other *Criminal Code* offences. That said, the military judge in *Deans* found that the minimum sentence is a guide that should be departed from only if good reason is provided. A significant gap between the prior conviction and the current offence may constitute a good reason.

[29] As for the law applicable to a driving prohibition order, there is no specific authority or regime in the *NDA*. In the *Criminal Code* however, subsection 320.24 (1) provides that if an offender is found guilty of the same offence, the court that sentences the offender shall, in addition to any other punishment that may be imposed for that offence, make an order prohibiting the offender from operating a vehicle for not less than three years, plus the entire period to which the offender is sentenced to imprisonment when there is more than two prior convictions. This means that the sentencing judge in courts of criminal jurisdiction has no discretion and must impose the order.

Analysis

[30] As part of my analysis, I have considered the range of punishments for similar offences, and examined the cases provided by the prosecution. Some of them were distinguishable:

(a) *R. v. Mitchell*, 2020 YKCA 2. The offender drove with a blood alcohol concentration two times the legal limit. He drove off the road and flipped his vehicle on a busy highway in the middle of a summer afternoon. He pleaded guilty at his trial. He had previous dated convictions for impaired driving including one in 1990 for impaired driving causing death. The Crown sought a greater sentence pursuant to section 727 of the *Criminal Code*. On appeal, the custodial sentence was increased to nine months and driving prohibition increased to four years;

(b) *R. v. Moreau*, 2007 BCCA 239. The applicant pleaded guilty before a judge of the Provincial Court to a one count indictment of impaired driving and was sentenced to three years in prison. He had a long history of alcohol abuse. It led to eight previous convictions for alcohol related

driving offences over a period of more than thirty years. His appeal was dismissed;

(c) *R. v. McVeigh*, [1985] O.J. No. 207. The offender was sentenced to twenty-one months' imprisonment for criminal negligence causing death arising out of a motor vehicle accident. He was very drunk when the motor vehicle he was driving struck and killed a fourteen-year-old boy. The offender also had a history of alcohol abuse;

(d) *R. v. Babulal*, 2020 ONCJ 140. The offender spent an evening drinking then decided to drive to a major highway to test the brake system light. Just before an exit, he crossed several lanes without signalling then drove into the path of a pickup truck. The truck narrowly avoided a collision. Police intercepted him and found that he was heavily intoxicated. It was his fifth conviction, but there were some significant gaps between convictions. There was no genuine expression of remorse when he was invited to speak on sentencing. A sentence of fourteen months' imprisonment was imposed; and

(e) *R. v. Master Corporal D.W. Deans*, 2004cm1008. Master Corporal Deans failed to yield at an intersection and collided with a vehicle driven by a US service member. No injuries were incurred, but the other vehicle was declared a total loss by the insurance company. Although he did not display any signs of impairment, an analysis of a blood sample taken by the German police put his blood alcohol level, at that time, at 186 milligrams of alcohol in 100 millilitres of blood. He pleaded guilty to the charge. He had one similar conviction. He was sentenced to fourteen days' imprisonment.

[31] The prosecution also relied on other, unpublished court martial cases related to similar offences committed in Germany where guilty pleas were accepted. These cases all preceded the *Deans'* decision: *Mantha*, the joint submission for a fine of $1,250 was imposed following a guilty plea; *R. v. Ireland*, (21 April 1998), CM 05/98 (unreported) a fine of $750 was imposed for a first offence. In *R. v. Drapeau*, (3 April 1992), CM 15/92 (unreported) a fine of $2,500 was imposed following a guilty plea for an offender who was convicted a second time for a similar offence, but there were significant mitigating circumstances. *R. v. Robichaud*, (22 January 1990), CM 07/90 (unreported) also received a punishment for a fine of $3,500, but similar to *Drapeau*, there were additional mitigating factors. Finally, in *R. v. Gelinas*, (1 December 1989), CM 56/89 (unreported) a second conviction of a similar offence, the offender was sentenced to fourteen days' imprisonment despite his guilty plea.

[32] As for the aggravating and mitigating factors:

(a) I have considered aggravating the impact of these events at the unit at the SHAPE, which illustrated the harm Mr Allison caused to discipline, being part of a small CAF community in Europe;

(b) that he was extremely intoxicated, therefore he constituted a high risk for the safety of the SHAPE and Casteau communities that evening, a factor that can be considered on sentencing *R. v. Campbell (W.S.)* (1991), 87 Nfld. & P.E.I.R. 269; 271 A.P.R. 269; 26 M.V.R. (2d) 319 (P.E.I.C.A.);

(c) that he had three previous convictions. With his past experiences with the judicial system, he should understand drinking and driving and its implications; and

(d) finally, when he got caught by the IMP, he attempted to set the vehicle in motion.

[33] I have also considered the twenty years gap, and his thirty-nine years service in the CAF.

[34] The Court finds that general and specific deterrence as well as denunciation are the principles of sentencing deserving greatest emphasis in this case. Considering the circumstances, the sentence must send a clear message to the Canadian community in Europe, to the CAF, and to the public, that operating a vehicle while impaired is a crime, not simply an error in judgment, and put people at great risk of harm. It will not be tolerated. Specific deterrence is also required because it is Mr Allison's alcohol abuse that exposes him to the risk of committing another related offence. He has little insight into his drinking problem, and in fact, it is only once he was informed of the charge against him that he decided to limit his alcohol intake and seek help. He stopped attending AA meetings last year despite successfully completing almost three months of sobriety. The measures he took then to reach sobriety were short-lived. I find his explanation to cease his attendance to be a mere excuse, particularly as he has not sought out other support groups. While he has taken some steps to deal with his forty-year-long struggle with alcohol addiction, he is still unsupported and relying on his personal will to control his addiction, his sobriety holding on by a thread, leaving serious concerns that he might repeat the commission of a similar offence. The punishment needs to deter him from doing so.

[35] This leads me to conclude that a fine would not properly or sufficiently address the need for general or specific deterrence. The only other punishment available to an SCM for a civilian is imprisonment. Mr Allison had in the past, been imposed fines as punishments, in addition to probation and driving prohibition orders. Although it has been twenty years, these measures were clearly not sufficient to deter him from reoffending. He is as of now, not being treated for his alcohol abuse, and is not participating, nor even seeking the help of a support group. Considering all the circumstances of the case at bar, I agree with the prosecution that a thirty-day period of incarceration would constitute the minimum necessary intervention that is adequate in

the circumstances. Any lesser punishment from this period of incarceration would fail to meet the objectives of general and specific deterrence. This punishment is within the range of punishments for similar offences. In sum, considering all the evidence, a punishment of thirty-days imprisonment is a punishment proportional to the gravity of the offence and the situation of the offender.

Driving Prohibition Order

[36] I must now consider the submission from the prosecution that the *NDA* grants courts martial with the authority to impose a mandatory three-year driving prohibition order.

[37] First, except for the punishment of imprisonment and fine, the scale of punishment found at section 139 of the *NDA* comprise exclusively of punishments crafted for the unique circumstances of service offenders:

> [. . .]
>
> (c) dismissal with disgrace from Her Majesty's service;
>
> [. . .]
>
> (e) dismissal from Her Majesty's service;
>
> (f) detention [which "seeks to rehabilitate service detainees, by re-instilling in them the habit of obedience in a structured, military setting, through a regime of training that emphasizes the institutional values and skills that distinguish the Canadian Forces member from other members of society.[. . .]Once the sentence of detention has been served, the member will normally be returned to his or her unit without any lasting effect on his or her career." QR&O article 104.09 at NOTE A];
>
> (g) reduction in rank;
>
> (h) forfeiture of seniority;
>
> (i) severe reprimand;
>
> (j) reprimand; and
>
> [. . .]
>
> (l) minor punishments, such as confinement to barracks.

[38] It goes without saying that section 175 of the *NDA* titled Punishment limitation or *Restriction quant à la peine,* limits the power of punishment of an SCM to a sentence that includes a punishment of imprisonment or a fine when the offender is a person other than an officer or a non-commissioned member, to make it unequivocally clear that the other punishments listed at section 139 cannot be imposed on a civilian offender. Indeed, these other punishments would have no force and effect on a person subject to the Code of Service Discipline who is not a military member, nor would they

achieve the fundamental purpose of sentencing of the military justice "to maintain the discipline, efficiency and morale of the Canadian Forces."

[39] The prosecution suggested however, that Parliament's intent when enacting section 175 of the *NDA* did not evacuate the authority for an SCM to impose other punishments on a civilian offender, such as those provided for in the *Criminal Code*. I disagree.

[40] First, while subsection 320.24(1) of the *Criminal Code* refers to sentencing the offender, "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", section 175 of the *NDA* uses instead the term "may only pass a sentence that includes a punishment of imprisonment or a fine." The distinction between "sentence" and "punishment" is relevant to this debate. In *R. v. Basque,* 2023 SCC 18 the SCC wrote at paragraph 6 that:

> The discretionary authority to grant credit under the common law can coexist harmoniously with judicial adherence to a mandatory minimum established by statute. This coexistence rests on the well-known distinction between the concepts of "punishment", understood as a deprivation, and of "sentence", understood as a judicial decision (in French, the distinction between "*punition*" and "*sentence*", where the term "*peine*" can also be used to convey both meanings). This distinction, considered by Rosenberg J.A. in the context of credit for pre-sentence custody in *R. v. McDonald* (1998), 40 O.R. (3d) 641 (C.A.), was taken up by Arbour J. of this Court in *R. v. Wust,* 2000 SCC 18, [2000] 1 S.C.R. 455, at paras. 35-37, with particular attention to the multiple meanings of the French term "*peine*". From this perspective, Arbour J. explained that while the term "*peine*" used in the sense of "punishment" refers to the total punishment imposed on an offender, the same word when used to mean "sentence" refers to the decision rendered by the court. It bears noting that a sentence is always prospective in order to prevent the judicial practice of backdating sentences (see s. 719(1) Cr. C.).

[41] The SCC addressed in this case the matter of the order prohibiting the offender from driving as being referred to as punishment in a very narrow context, being whether the sentencing judge could impose a credit for the driving prohibition period that was already completed when the sentence was imposed. The SCC had to decide whether imposing the order constitutes a "sentence" or a "punishment". Finding that no conflict arises from the concurrent application of paragraph 259(1)(a) of the *Criminal Code* (now section 320.24) and the common law rule that allows credit to be granted, it stated that this provision is a "minimum punishment", not a "minimum sentence", and that it was indeed a form of punishment, at paragraph 68. Had the court reached a conclusion to the contrary, the offender would have faced a double punishment, which is counter "to the most fundamental requirements of justice and fairness".

[42] Considering *Basque*, when comparing the terminology used for both section 320.24 of the *Criminal Code* and section 175 of the *NDA*, it is apparent that Parliament's intent was to limit the power of punishments of a court martial to those listed at section 139 of the *NDA*, because of the wording "<u>may only pass a sentence</u> that includes a punishment of imprisonment or a fine". [My emphasis.] Thus, if I was to accept the contention that the order is indeed a punishment, the "punishment" of

imposing a “driving prohibition” is not within the jurisdiction of the court martial because the decision, or “sentence”, may only include a punishment of imprisonment or a fine and none other. In other terms, those punishments found in the *Criminal Code* are not within the reach of an SCM under the clear construct of both sections 139 and 175 of the *NDA*, which are specific provisions that complement the general provision of section 130 of the *NDA*.

[43] Lastly, it was argued that section 179 of the *NDA* would provide an appropriate authority to impose the order sought by the prosecution. I am of the view that it is not the case. Courts martial are courts of exception. They are statutory courts, limited to the powers found in the Act that created them. Several court martial decisions confirmed that section 179 is not a catch-all or default provision that would apply when the exercise of a power is not specifically established in the *NDA*. (*R. v. Machtmes*, 2021 CM 2002, but also *R. v. Tarso*, 2022 CM 5013, and *R. v. Waugh*, 2021 CM 5022). Such authority can only be exercised in certain circumstances, in particular when it does not contradict or obfuscate the *NDA* or its intent. Here, section 175 makes it clear that the powers of punishment of courts martial are limited to a fine or imprisonment for a civilian offender. Therefore, imposing an order under the authority of section 179 would contravene section 175 of the *NDA*. Since there are no specific provisions in the *NDA* that would grant the authority for this Court to impose a driving prohibition order, it does not have authority to do so.

IV. Conclusion

[44] I conclude that a fine would not properly or sufficiently address the need for general or specific deterrence. The only other punishment available to an SCM for a civilian is imprisonment. Considering the circumstances of the offender and of the offence, including the twenty-year gap, I agree with the prosecution that a thirty-day period of incarceration would constitute the minimum necessary intervention that is adequate. Lastly, the Court does not have authority in this case to impose a driving prohibition.

[45] Mr Allison, you have a long path to recovery. You have to be mindful that your drinking problem may harm others. You have recognized that your conduct has harmed your family. Hopefully, you will take decisive steps to prevent reoffending.

FOR THESE REASONS, THE COURT

[46] **SENTENCES** Mr Allison to thirty days’ imprisonment, to be served in the Ottawa-Carleton Detention Centre.

[47] The sentence was passed at 1411 hours on 18 September 2024.

Counsel:

The Director of Military Prosecutions as represented by Lieutenant-Commander J.M. Besner, Lieutenant-Colonel M.A. Pecknold, and Lieutenant(N) A. Keaveny

Lieutenant(N) D. De Thomasis and Major I. Gagné, Directorate of Defence Counsel Services, Counsel for Civilian D.E. Allison