NOVA SCOTIA COURT OF APPEAL

Citation: *Carroll v. Canada (Attorney General)*, 2017 NSCA 66

Date: 20170713
Docket: CA 448585
Registry: Halifax

Between:

Robert Charles Carroll

Appellant

v.

The Attorney General of Canada

Respondent

Judges:	The Honourable Justice Elizabeth Van den Eynden The Honourable Chief Justice Michael MacDonald, dissenting
Appeal Heard:	January 18, 2017, in Halifax, Nova Scotia
Subject:	Extradition. s. 7 *Charter*. Principles of fundamental justice. Assurances
Summary:	The United States requested extradition of Mr. Carroll to stand trial in Minnesota for sexual misconduct offences. The Minister of Justice and Attorney General of Canada (Minister) ordered his surrender. Mr. Carroll applied for judicial review claiming the decision to surrender was unreasonable. Mr. Carroll is concerned that, if convicted, there is a real risk he will face indefinite civil commitment under Minnesota's Sex Offender Program (MSOP) after he serves any penal custodial sentence. He argued indefinite detention would violate his s. 7 *Charter* rights. He requested the surrender order be set aside and the matter returned to the Minister for redetermination.

Issues: Was the Minister's decision to surrender reasonable?

Result: Application allowed. Minister failed to consider all the relevant evidence and conduct a proper analysis. Decision unreasonable in these circumstances. Surrender decision set aside and matter remitted to Minister for redetermination with directions.

MacDonald, C.J.N.S. (dissenting): Decision to surrender was reasonable. Minister committed no reviewable error.

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Judges:	MacDonald, C.J.N.S., Saunders and Van den Eynden, JJ.A.
Appeal Heard:	January 18, 2017, in Halifax, Nova Scotia
Held:	Appeal allowed, per reasons for judgment of Van den Eynden, J.A.; Saunders, J.A. concurring; MacDonald, C.J.N.S. dissenting;
Counsel:	Lee Cohen, Q.C. and Scott McGirr, for the appellant Patricia MacPhee, for the respondent

Reasons for judgment:

Overview

[1] The United States requested extradition of Robert Carroll to stand trial in the State of Minnesota for sexual misconduct offences. The Minister of Justice and Attorney General of Canada (Minister) ordered his surrender. Mr. Carroll applied to this Court for judicial review. He seeks to set aside the surrender order and have the matter returned to the Minister for redetermination.

[2] Mr. Carroll maintains the decision to surrender is unreasonable. He believes that, if convicted, there is a real risk he will face indefinite civil commitment under Minnesota's Sex Offender Program (MSOP) after he serves any penal custodial sentence. He argues indefinite detention violates his s. 7 *Charter* rights and would shock the conscience of ordinary Canadians. He asserts the Minister failed to properly consider all the evidence when assessing his level of risk for civil commitment. Later, I will address the specific concerns with MSOP.

[3] The Minister found that Mr. Carroll's surrender would not be unjust or oppressive nor would it violate Mr. Carroll's *Charter* rights. However, the Minister sidestepped any analysis of the evidence before her respecting the apparent and serious problems with the MSOP. She did so by relying on representations from the United States prosecuting authority which suggested that Mr. Carroll did not meet the civil commitment criteria under the MSOP. Thus, she concluded it was unlikely he would ever be subject to civil commitment. Mr. Carroll agues that the Minister's narrow and exclusionary assessment of risk is fatally flawed.

[4] The question to be answered is whether the Minister's decision to surrender was reasonable. With respect, I conclude it is not. For the reasons that follow, I would set aside the surrender order, and refer the matter back to the Minister for redetermination with the directions set out herein.

Background

[5] To assess the reasonableness of the Minister's decision, it is important to understand the following relevant background.

The charges and extradition process

[6] Mr. Carroll, who is a Canadian citizen, lived in Minnesota, United States, from 1998 until 2008. He went there to pursue a relationship. He married, but the relationship eventually broke down and, following his divorce in 2008, Mr. Carroll returned to Canada.

[7] He stands accused of sexually abusing his stepdaughter, who is described as having special needs. His former spouse fostered the complainant and adopted her prior to her marriage to Mr. Carroll. The complainant alleges the abuse started in 2003, when she was 13 years old, and continued until 2008. A summary of her statement was prepared by United States prosecuting authorities and is contained in the record. If her evidence is accepted by a court, the assaultive acts were grave. The reported frequency was approximately every other night for about five years. The alleged misconduct includes sexual touching, vaginal digital penetration, sexual intercourse and forcing the child to perform oral sex on Mr. Carroll.

[8] The allegations were disclosed by the complainant and reported to authorities in October 2011. This was after Mr. Carroll and his wife divorced and the complainant's relationship with her mother had broken down, and she had returned to foster care. Charges were originally laid against Mr. Carroll in the United States in February 2012 and later amended to the following:

> Count 1: Criminal Sexual Conduct in the First Degree – Penetration – Actor in Position of Authority, in violation of Minnesota Statute §609.342 subdivision 1(b);
>
> Count 2: Criminal Sexual Conduct in the First Degree – Penetration – Actor with Significant Relationship – Multiple Acts Over Time, in violation of Minnesota Statute §609.342 subdivision 1(h)(iii); and
>
> Count 3: Criminal Sexual Conduct in the Third Degree – Penetration, in violation of Minnesota Statute §609.344 subdivision 1(e).

The maximum term of imprisonment under Minnesota law for Counts 1 and 2 is 30 years and 15 years for Count 3. Mr. Carroll denies all allegations.

[9] In September 2015, the United States authorities requested Mr. Carroll's extradition pursuant to the extradition treaty between the United States and Canada. In October 2015, extradition proceedings were authorised by the Canadian government under s. 15 of the *Extradition Act*. During the authorization process,

corresponding Canadian offences were identified; namely, sexual interference and sexual exploitation, contrary to s. 151 and 153 respectively of the *Criminal Code*.

[10] There is no challenge to the authority to proceed or the Minister's determination that prosecution in Canada is not a realistic option, and that the United States is the most appropriate jurisdiction to proceed with prosecution of these offences.

[11] A warrant for Mr. Carroll's arrest was obtained under the *Extradition Act*. He was arrested in Nova Scotia on November 8, 2015. He consented to his committal before a Justice of the Nova Scotia Supreme Court. He was subsequently released on bail pending the Minister's surrender decision. He remains on judicial release by order of this Court pending his judicial review application.

The MSOP and the concerns identified

[12] In the State of Minnesota, a convicted sex offender, if committed to the MSOP, is subject to further indeterminate detention (civil commitment) upon completion of any penal sentence. The commitment criteria are set out under the *Minnesota Civil Commitment and Treatment Act* (MCTA). If an offender is determined to be a sexually dangerous person and/or have a sexual psychopathic personality the offender shall be committed. Upon committal, typically an offender is sent to one of two secure facilities operated by the MSOP. At least theoretically, if the offender can on clear and convincing evidence establish that a less restrictive program is available (plus meet other conditions), secure detention might be avoided.

[13] Under the MCTA a county attorney has the authority to proceed with a petition for civil commitment if good cause is found to exist. A petition request can find its way to the county attorney through several routes. Following conviction and sentencing, the judge can make an initial assessment and recommendation. Once incarcerated, the offender is mandated to undergo an assessment for civil commitment by the Department of Corrections and the Commissioner of Prisons can recommend. These requests for petition can be acted upon or the county attorney can act on their own accord. If good cause exists, which is not a defined term, the county attorney must file a petition. Discretion is not present on the language in the statute. (Minn. Stat. § 253D.07, subdivision 2 (2016).)

[14] Petitions typically proceed near the end of an offender's penal sentence which, in Mr. Carroll's case, could be many years down the road, and after he undergoes his mandated formal risk assessment. The state carries the burden of proof for committal, but the threshold of this civil proceeding is clear and convincing evidence. I note, Mr. Carroll argues that the representations given by United States prosecuting attorneys (to the effect his risk of commitment is unlikely) are premature. That is a legitimate concern which I will canvass in detail later.

[15] Ostensibly, the MSOP is supposed to be a therapeutic treatment program. Sex offenders are committed for treatment for an indeterminate amount of time, meaning they may be held for however long it takes to successfully be treated and satisfy public safety concerns.

[16] Counsel for Mr. Carroll describes the MSOP as a custodial prison sentence in sheep's clothing. He claims the MSOP is a broken system and it is impossible for those committed to meet the criteria for release. He fears the only way out of this regime is death. Strong statements to make.

[17] Having reviewed the record and court decisions which have specifically identified dysfunction within the MSOP, Mr. Carroll has good reason to be fearful of facing an indeterminate civil sentence should he enter the MSOP. What then are the specific identified concerns with the MSOP?

[18] Mr. Carroll relied upon the recent case of *Karsjens v Jesson*, 109 F. Supp. 3d 1139 (D. Minn. 2015) to establish his concerns. Substantive submissions were made to the Minister and to this Court respecting the importance of this decision to Mr. Carroll's extradition. Thus, a case summary is helpful as well as reference to several key factual findings.

[19] In *Karsjens*, the plaintiffs, who were all civilly committed to the MSOP, brought a civil rights action challenging the constitutionality of the *Minnesota Civil Commitment and Treatment Act* (MCTA).

[20] In his written decision dated June 15, 2015, District Court Judge Donovan W. Frank condemned the MSOP and found the civil commitment statutory scheme unconstitutional, both on its face (as written) and as applied (due process).

[21] At the time the Minister rendered her decision, the *Karsjens* case was before the United States Court of Appeals for the Eighth Circuit, but no decision had been

rendered. Pending determination of the appeal, the appeal court granted a stay of the district judge's decision.

[22] At the time this Court heard Mr. Carroll's judicial review application, the Court of Appeals had reversed the district court's unconstitutionality finding. (See *Karsjens v. Piper*, 845 F. 3d 394 (8th Cir. 2017) released January 3, 2017.) The Court of Appeals determined that the district judge applied incorrect standards of scrutiny when analyzing whether the MSOP legislation framework was constitutional. The standard determined by the appellate court was far more deferential to the legislature. The *Karsjens* decision is still under appeal. The appeal is before the United States Supreme Court. A decision on leave and any ultimate decision is not expected any time soon.

[23] Although the district judge's unconstitutionality finding was reversed by application of different standards of scrutiny, it appears his findings of fact respecting the serious shortcomings with the MSOP were undisturbed on appeal. For the purpose of this judicial review application, I need not analyze the appellate decision; however, it is important to note that just because the United States Court of Appeals concluded the MSOP passed the lessor constitutional threshold it imposed does not mean it would pass review of the constitutional protections afforded to Mr. Carroll under s. 7 of our *Charter*. There are many worrisome problems and apparent due process gaps with the MSOP and, based on the Court of Appeals decision in *Karsjens*, it appears the due process rights afforded to Mr. Carroll under the United States Constitution might differ from Canadian law. In my view, the MSOP might well violate our principles of fundamental justice. I stop short of conducting a full analysis and drawing that conclusion because this matter is being sent back to the Minister for redetermination. It was the Minister's responsibility in the first instance to conduct a proper s. 7 analysis should Mr. Carroll be exposed to risk of civil commitment. The Minister did not do so, but as I address in ¶ 85, I direct her to do so upon redetermination.

[24] I now turn to the district judge's findings of fact, which were not disturbed on appeal. He found many fundamental flaws with the MSOP. He determined it strayed from its intended therapeutic objective. Judge Frank said this is his introductory summary (page 4):

> As detailed below, the Court conducted a lengthy trial over six weeks to determine whether it should declare that the Minnesota statutes governing civil commitment and treatment of sex offenders are unconstitutional as written and as applied. The Court concludes that Minnesota's civil commitment statutes and sex

> offender program do not pass constitutional scrutiny. The overwhelming evidence at trial established that Minnesota's civil commitment scheme is a punitive system that segregates and indefinitely detains a class of potentially dangerous individuals without the safeguards of the criminal justice system.
>
> The stark reality is that there is something very wrong with this state's method of dealing with sex offenders in a program that has never fully discharged anyone committed to its detention facilities in Moose Lake and St. Peter since its inception in 1994. . . . In light of the structure of the MSOP and the history of its operation, no one has any realistic hope of ever getting out of this "civil" detention. Instead, it is undisputed that there are committed individuals who meet the criteria for reduction in custody or who no longer meet the criteria for commitment who continue to be confined at the MSOP.

[25] His review of the evidence and findings of fact comprise some 44 pages of his detailed 76-page decision. His findings (set out in 182 paragraphs) speak volumes about the real risk of indefinite detention sexual offenders face in Minnesota given the State's current legislative framework. He identified serious problems with the commitment/assessment process; lack of proper facilities; lack of training of staff and therapeutic resources; lack of any meaningful periodic review process available for those committed to assess ongoing level of risk or needs; lack of an effective mechanism permitting those committed to seek a discharge or lesser restrictions; and the government's failure to implement much needed legislative reform to the governing statutory framework notwithstanding multiple calls to do so.

[26] I will reference only some of his specific findings:

> 25. . . . the MSOP has developed into indefinite and lifetime detention. Since the program's inception in 1994, no committed individual has ever been fully discharged from the MSOP, and only three committed individuals have ever been provisionally discharged from the MSOP. By contrast, Wisconsin has fully discharged 118 individuals and placed approximately 135 individuals on supervised release since 1994. New York has fully discharged 30 individuals—without any recidivism incidents, placed 125 individuals on strict and intensive supervision and treatment ("SIST") upon their initial commitment, and transferred 64 individuals from secure facilities to SIST.
>
> 26. Minnesota presently has the lowest rate of release from commitment in the nation.
>
> 27. Since the MCTA's enactment in 1994, the number of civilly committed sex offenders in Minnesota has grown significantly. The total number of civilly committed sex offenders in Minnesota has grown from less than 30 in 1990, to 575 in 2010, to a current count of approximately 714. From 2000 to 2010, the civilly committed population in

> Minnesota grew nearly fourfold. The state projects that the number of civilly committed sex offenders will grow to 1,215 by 2022.
> . . .
>
> 35. … Prior to December 2003, the DOC [Commissioner of the Department of Corrections] focused on identifying sex offenders who were clearly dangerous for possible commitment. Beginning in December 2003, the DOC began referring all sex offenders who the DOC believed satisfied the legal commitment standard or who the DOC believed might qualify for civil commitment to county attorneys.
> . . .
>
> 37. . . . Currently, the DOC refers approximately one-third of those reviewed for commitment. Every sex offender that the DOC has referred for commitment has served their full prison sentence.
>
> 38. The majority of commitments result from referrals by the DOC to county attorneys.

As noted in ¶ 14 referrals from the DOC are typically made at the end of the custodial sentence and after formal assessment.

> 40. Since 1994, various evaluators have published reports that are critical of the state's civil commitment system, the MCTA, and the MSOP's treatment program structure. The Governor's Commission on Sex Offender Policy ("Governor's Commission") issued a report in January 2005 recommending, among other things, the transfer of the screening process of sex offenders for possible civil commitment to an independent panel and the establishment of a continuum of treatment options. The Office of the Legislative Auditor for the State of Minnesota ("OLA") issued a report in March 2011 ("OLA Report") recommending numerous changes to the civil commitment statutory scheme as well as to the MSOP, including revising statutory commitment standards and creating lower cost, reasonable alternatives to commitment at high-security facilities. The Sex Offender Civil Commitment Advisory Task Force ("Task Force") recommended, among other things, that the Commissioner of DHS develop less restrictive programs throughout the state. The MSOP Program Evaluation Team ("MPET") found that the MSOP's requirements for phase progression may be too stringent and recommended modification of the phase progression criteria. The Rule 706 Experts published reports criticizing the commitment and placement of certain committed individuals and a final report identifying problems with various aspects of the program, including the lack of periodic assessments. The MSOP Site Visit Auditors have issued reports every year since 2006 that have identified deficiencies in the program and statutory scheme and have included recommendations to improve the civil commitment system.
>
> 41. During the 2013-2014 legislative session, Senator … introduced a bill, Senate File Number 1014, which included provisions that would have implemented certain recommendations by the Task Force. Although the bill passed the Senate on May 14,

2013, the bill did not become law because the companion bill that was introduced … in the House of Representatives, House File Number 1139, did not pass the House.

42. During the 2015-2016 legislative session, Senator …introduced a bill, Senate File Number 415, which included provisions that would have established and appropriated funding to a civil commitment screening unit to review cases and conduct evaluations; required biennial reviews; implemented a statewide sex offender civil commitment judicial panel; and established a sex offender civil commitment defense office. The bill was referred to the Senate Committee on Health, Human Services and Housing in January 2015, but did not reach the Senate floor.

. . .

51. The evidence clearly establishes that hopelessness pervades the environment at the MSOP, and that there is an emotional climate of despair among the facilities' residents, particularly among residents at the Moose Lake facility. Bolte, Karsjens, Foster, and Eric Terhaar ("Terhaar"), offered compelling testimony regarding the "hopeless environment" at the MSOP. Bolte credibly testified that he is "[e]xtremely hopeless" because he believes that "the only way to get out is to die." …Dr. Freeman corroborated that many individuals in CPS expressed severe hopelessness. Terrance Ulrich ("Ulrich"), a Senior Clinician at the MSOP Moose Lake facility, agreed that there is a perception among committed individuals that they will never be discharged from the MSOP and that "they might die in the facility." Ronda White ("White"), a Treatment Psychologist at the MSOP Moose Lake facility, offered persuasive testimony that working at the facility can be difficult "because of the hopelessness."

. . .

53. There is no alternative placement option to allow individuals to be placed in a less restrictive facility at the time of their initial commitment to the MSOP….
This lack of less restrictive facilities and programs undermines the MCTA's provision allowing a committing court to consider placing an individual at a less restrictive alternative.

54. It is undisputed that there are civilly committed individuals at the MSOP who could be safely placed in the community or in less restrictive facilities. …

. . .

56. In recent years, DHS attempted to provide less restrictive placement options for civilly committed individuals at the MSOP. In September 2013,
Commissioner Jesson sent a letter to the Minnesota Legislature identifying committed individuals at the MSOP who could be transferred to an existing DHS site in Cambridge, Minnesota. Commissioner Jesson expected the facility to become available to the MSOP in 2014. Commissioner Jesson credibly testified that she planned to transform the Cambridge facility to become a less restrictive alternative for individuals committed as sex offenders. However, those efforts were halted by Governor Dayton's November 2013 letter.

A copy of that letter is contained in the record, to which I will later refer.

. . .

60. The stated goal of the MSOP's treatment program, observed in theory but not in practice, is to treat and safely reintegrate committed individuals at the MSOP back into the community.

. . .

68. There are no reports or assessments conducted at the time of admission to determine what phase of treatment a committed individual should be placed in at the MSOP.

. . .

102. The MSOP has no system or policy in place to ensure that committed individuals who are not progressing through the treatment phases in a timely manner are reviewed by clinicians at the MSOP or by external reviewers. …

. . .

104. Clinical staffing shortages and turnover at the MSOP have hindered the ability of the MSOP to provide treatment as designed and have impeded treatment progression of committed individuals at the MSOP.

. . .

107. There are individuals who meet the reduction in custody criteria or who no longer meet the commitment criteria, but who continue to be confined at the MSOP.

108. Defendants are not required under the MCTA to conduct periodic risk assessments after the initial commitment to determine if individuals meet the statutory requirements for continued commitment or for discharge.

109. The large majority of states require regular risk assessments of all civilly committed sex offenders. For example, the Wisconsin and New York civil commitment statutes require annual risk assessments, and the Texas civil commitment statute requires biannual reviews and a hearing before a court to determine whether an individual no longer meets the criteria for commitment.

110. As of 2011, Minnesota and Massachusetts were the only two states that did not require annual reports to the courts regarding each sex offender's continuing need to be committed.

111. Significantly, a full risk assessment is the only way to determine whether a committed individual meets the discharge criteria.

112. Risk assessments are only valid for approximately twelve months. Johnston and Puffer credibly testified that if a risk assessment has not been conducted within the past

> year on civilly committed individuals at the MSOP, the MSOP does not know whether those individuals meet the statutory criteria for commitment or for discharge.
> …
>
> 114. The MSOP does not conduct risk assessments on a regular, periodic basis to determine whether an individual continues both to need further inpatient treatment and supervision for a sexual disorder and continues to pose a danger to the public.
> …
>
> 130. The MSOP risk assessors...credibly testified that they did not receive any training regarding the constitutional standards for commitment or discharge.
> …
>
> 162. There is no policy or practice at the MSOP, nor a requirement in the statute, that requires the MSOP to file a petition on an individual's behalf, even if the MSOP knows or reasonably believes that the individual no longer satisfies the statutory or constitutional criteria for commitment or for discharge.
> …
>
> 164. The MSOP knows that there are Class Members who meet the reduction in custody criteria or who no longer meet the commitment criteria but who continue to be confined at the MSOP.
>
> 165. Despite its knowledge that individuals have met the criteria for release, the MSOP has never petitioned on behalf of a committed individual for full discharge.
> …
>
> 175. Individuals confined at the MSOP have expressed confusion and uncertainty regarding the petitioning process, and some have been deterred from petitioning due to the daunting petitioning process. …

[27] After making his factual determinations and setting out the constitutional review standards he applied, Judge Frank concluded at pages 66 to 68:

> The Court concludes that the evidence presented over the course of the six-week trial in this case demonstrates that Minnesota's civil commitment statutory scheme is unconstitutional both on its face and as applied. Contrary to Defendants' assertions, the Court concludes that the "shocks the conscience" standard does not apply to Plaintiffs' facial and as-applied challenges because Plaintiffs' substantive due process claims involve the infringement of a fundamental right. *See Cooper*, 517 U.S. at 368-69; *Flores*, 507 U.S. at 316 (O'Connor, J., concurring); *Foucha*, 504 U.S. at 80; *Jones*, 463 U.S. at 361; *Vitek*, 445 U.S. at 492; *Blodgett*, 510 N.W.2d at 914. After applying the strict scrutiny standard, the Court concludes that Minnesota's civil commitment statutory

scheme is not narrowly tailored and results in a punitive effect and application contrary to the purpose of civil commitment and that the MSOP, in implementing the statute, systematically continues to confine individuals in violation of constitutional principles.

Specifically, the Court concludes that section 253D is facially unconstitutional for the following six reasons: (1) section 253D indisputably fails to require periodic risk assessments and, as a result, authorizes prolonged commitment even after committed individuals no longer pose a danger to the public and need further inpatient treatment and supervision for a sexual disorder; (2) section 253D contains no judicial bypass mechanism and, as such, there is no way for Plaintiffs to timely and reasonably access the judicial process outside of the statutory discharge process to challenge their ongoing commitment; (3) section 253D renders discharge from the MSOP more onerous than admission to it because the statutory discharge criteria is more stringent than the statutory commitment criteria; (4) section 253D authorizes the burden to petition for a reduction in custody to impermissibly shift from the state to committed individuals; (5) section 253D contemplates that less restrictive alternatives are available and requires that committed individuals show by clear and convincing evidence that a less restrictive alternative is appropriate, when there are no less restrictive alternatives available; and (6) section 253D does not require the state to take any affirmative action, such as petition for a reduction in custody, on behalf of individuals who no longer satisfy the criteria for continued commitment.

In addition, the Court further concludes that section 253D is unconstitutional as applied for the following six reasons: (1) Defendants do not conduct periodic, independent risk assessments or otherwise evaluate whether an individual continues to meet the initial commitment criteria or the discharge criteria if an individual does not file a petition; (2) those risk assessments that have been performed have not all been performed in a constitutional manner; (3) individuals have remained confined at the MSOP even though they have completed treatment or sufficiently reduced their risk; (4) discharge procedures are not working properly at the MSOP; (5) although section 253D expressly allows the referral of committed individuals to less restrictive alternatives, this is not occurring in practice because there are insufficient less restrictive alternatives available for transfer and no less restrictive alternatives available for initial commitment; and (6) although treatment has been made available, the treatment program's structure has been an institutional failure and there is no meaningful relationship between the treatment program and an end to indefinite detention.

The Fourteenth Amendment does not allow the state, DHS, or the MSOP to impose a life sentence, or confinement of indefinite duration, on individuals who have committed sexual offenses once they no longer pose a danger to society. The Court must emphasize that politics or political pressures cannot trump the fundamental rights of Class Members who, pursuant to state law, have been civilly committed to receive treatment. The Constitution protects individual rights even when they are unpopular. As Justice Sandra Day O'Connor sagely observed,

> "[a] nation's success or failure in achieving democracy is judged in part by how well it responds to those at the bottom and the margins of the social order. ….

[28] As stated, the Court of Appeals determined the district judge applied wrong standards of scrutiny to the facts and reversed his finding of a constitutional violation. And that decision is now under appeal. Notwithstanding the uncertainty of the final constitutional adjudicative outcome, what appears to be clear from the district judge's undisturbed findings of fact, is that there are real and substantive risks associated with committal to the MSOP.

[29] At the time the Minister rendered her decision she had before her these disturbing factual findings and legal conclusions drawn by the district judge. However, the Minister siloed this information. She did not factor it into her analysis of Mr. Carroll's risk of civil commitment. Later I will explain how that impacted her analysis and lead to error.

[30] I will address two other main sources Mr. Carroll referred the Minister and this Court to when assessing the risks of indefinite civil committal. The first is described as political influence in the State of Minnesota bent on opposing reform to the MSOP. The second is reference to another decision in which an extradition request to Minnesota was refused due to the risks associated with indefinite civil commitment. The Minister similarly siloed this information from any analysis.

[31] I will first deal with political pressure influencing the commitment and release process. The district judge addressed this in his decision. Above, I noted his reference to Governor Dayton's November 13, 2013 letter and in a decision footnote (page 68) he stated:

> Benson credibly testified that "the politics around the program are really thick" and that "politics guide the thinking of those involved in the [release] process," which Benson described as a "political crapshoot." Benson further credibly testified that "I think this is an area where people have got to rise above the politics and do the right thing or . . . this program is going to, I think, eventually be deemed unconstitutional, and in its current form probably should be." The Task Force Report corroborated these observations, stating that "the Task Force is deeply concerned about the influence of public opinion and political pressure on all levels of the commitment process."

[32] Turning to the Governor's November 13, 2013 letter to an official responsible for the operation of the MSOP, one can see why Mr. Carroll might

describe the MSOP as a custodial prison sentence in sheep's clothing. The letter is contained in the record and the following excerpts are illustrative:

> Dear Commissioner Jesson:
>
> By way of background, as you know, for many years the State of Minnesota has kept its most serious criminal sexual offenders locked away with virtually no chance of release. That is where most Minnesotans would prefer to keep them, and I agree. As a father and a grandfather, I believe the risks are too high to allow them to walk freely.
>
> [. . .]
>
> Until now, the State's tactic to avoid releasing the most serious sexual offenders after they had served their criminal sentences has been to commit them to a "treatment program" in a locked facility at either Moose Lake or St. Peter for an indefinite period of time. The laws establishing these "civil commitments," which were enacted by previous governors and legislatures, spelled out the conditions, which, when met, were supposed to lead to the provisional discharge of those patients who progressed through treatment to secure but less restrictive treatment facilities. In practice, however, these civil commitments have turned into virtual life sentences. During the past twenty years, only one person has been successfully provisionally released.
>
> As a result, there are now 697 men and one woman, who have been locked away for as long as twenty years after completing their criminal sentences. As I said before, most Minnesotans, including me, would prefer that they stay that way. However, motions are pending before a federal judge arguing that this method of locking people away for life, without giving them actual life sentences, is unconstitutional.
>
> If the federal judge finds the program unconstitutional, you and I will be put in the position of having to do what previous governors and their administrations have avoided: establish treatment and settings that meet the Court's requirements, while doing our best to protect the public's safety.
>
> At the same time, the current Minnesota Legislature will have to do what previous legislatures have avoided: revise existing state laws, which govern both the criminal and civil commitments of convicted sex offenders, as well as the conditions for their release; and establish and fund the facilities, programs and services, which will be needed to satisfy the Constitution, while safeguarding the public's safety.

[33] In his letter, Governor Dayton went on to bluntly direct the Commissioner to oppose any future petitions by sexual offenders for provisional releases and to suspend plans to transfer sexual offenders to other facilities, until certain conditions he set out were met. Nowhere in the record does it indicate if such

conditions have been met. His correspondence was copied to the Commissioner for the Department of Corrections. As noted above, the district judge found that the majority of referrals recommending that a petition for civil commitment be filed are made by the DOC. The point being a suggestion of influence on the front end (the commitment process) and then once committed, no release. In a similar vein, the record also contains an executive order issued by Governor Pawlenty in 2003 and affirmed by Governor Dayton in 2011 (which remains in effect).

[34] Mr. Carroll also relied on *Sullivan v. The Government of the United States* [2012] EWHC 1680 (Admin). This case has similarities to Mr. Carroll's. In *Sullivan,* United States authorities also sought extradition of an alleged sex offender to the State of Minnesota. The risk of indefinite civil detention in the MSOP was front and centre. Based on the portion of the record reviewed in the appeal decision, the charges against Mr. Carroll seem to be more serious given the alleged repeated nature over a five-year period and him being in a position of trust. The court determined that there was a real risk that if extradited Mr. Sullivan might be subject to civil commitment. The court found that risk was not fanciful and would result in a flagrant denial of his rights under Article 5.1 (protecting against deprivation of liberty) of the *European Convention on Human Rights*. In *Sullivan,* United States authorities originally argued that the risk of commitment was low, as they do in Mr. Carroll's case, but on appeal that shifted to any assessment of risk would be premature as the timing of any such determination would be far off in the future—one of the points Mr. Carroll legitimately makes, which I will later address. The court did not have the benefit of the *Karsjens* decision, but it had the benefit of expert testimony, speaking to the problems/risks with the MSOP as well as Mr. Sullivan's specific risk level. The expert had applied screening tools used by the State and predicted that his probability of commitment was greater than 80%. The change in the government's position from low risk to being too premature to assess risk of commitment seemed to be in response to this evidence.

[35] Lord Justice Moses, writing for the court, said:

> 5. Civil commitment is unknown to European law, but is a process available in 20 states in the United States. Minnesota's law is said to be more draconian than many others. Under Minnesota law, as described by Professor Janus, who has considerable experience of representing those subjected to petitions for civil commitment in Minnesota, a "sex offender" may be committed indefinitely if under criteria specified in the Sexually Dangerous Persons Act 1994 he is found by a judge to be "irresponsible for personal conduct with respect to sexual matters and thereby dangerous to other persons". The evidence at the date of the hearing

suggested that no sex offender committed to indeterminate detention since the programme began in its current form in 1988 has been released. The Court was referred to three cases where there is a likelihood of release but when I questioned counsel for the United States he was unable to report that any one of those three had been released at the time of this hearing.

[. . .]

7. Professor Janus's report explains and expands upon a report prepared by the Office of the Legislative Auditor (OLA) for the State of Minnesota "a Valuation Report: Civil Commitment of Sex Offenders" published in March 2011 and applies the Minnesota Department of Corrections "Sex Offender Screening Tool" (MnSOST-R).

8. The OLA reports that the standard for commitment is relatively low, and many sexual offenders qualify for commitment. It is not necessary to establish that a person has an inability to control his sexual impulses. It is sufficient to prove that he cannot "adequately control his sexual impulses" (in re Linehan (Linehan II 594N.W2d 867 at 876)). Unconvicted criminal misconduct may be taken into account. A course of harmful sexual conduct may be established on as few as two prior incidents. It is important to record that Minnesota law does not require that a person be mentally ill or mentally incompetent to be committed as a sex offender. Although a trial court must find that future sexual crime is highly likely, Professor Janus says that Minnesota courts have approved commitment despite evidence showing only moderate risk of future sexual misconduct.

[. . .]

12. The underlying scheme of the procedure and law is not in dispute. But there is a dispute between Professor Janus and Judith L Cole, Assistant Prosecuting Attorney for Hennepin County, as to the risk of an order for civil commitment, if the appellant is extradited.

13. Articulating how risk is to be measured is notoriously difficult. Plainly, if the risk of infringing the requested person's convention rights is fanciful there can be no question of refusing extradition. At the other end of the spectrum will be cases where an infringement is a "near certainty". That was the test suggested in relation to Art. 2 by the Commission in *Dehwari v The Netherlands* 29 E.H.R.R. CD 74 (paragraph 61). But between those two extremes there exists the difficulty of identifying the extent of the risk which an applicant must establish before he can resist extradition.

[. . .]

20. These predictions are disputed by Judith L Cole, the Assistant Hennepin County Attorney. In her affidavit she accuses Professor Janus of lack of objectivity and speculation. Her stance is that at this stage the United States cannot say whether a petition for civil commitment will be filed (see paragraph 5). The timing for determination does not occur until 12 months before a person

convicted completes his prison sentence. No accurate score can be predicted until a person has actually served a prison sentence "because a significant part of the scoring involves institutional/dynamic variables that include disciplinary history, chemical dependency treatment, and sex offender treatment while incarcerated" (paragraph 6). This is not of particular comfort in light of the fact that there have been difficulties in providing treatment, as recorded by the Office of the Legislative Auditor, and the fact that although Judith Cole noted in November 2011 that of the three individuals on the verge of release, none had in fact been released by the time of this hearing.

21. The Department of Justice supports Miss Cole's evidence, noting that during the four year period 2006-2009, only about 13% of all sex offenders released from prison in Minnesota were referred by the Department of Corrections to county attorneys for possible civil commitment. Further, as the Office of the Legislative Auditor noted, only about three per cent of registered sex offenders in Minnesota are civilly committed. In light of the expected sentence in the region of 86 months' imprisonment, the Government of the United States, therefore, contends that there is no basis for concluding that Mr Sullivan faces a real risk of civil commitment and that it is not realistically possible at the moment to predict whether he is at risk or not.

[. . .]

28. In my view, the apparent change of emphasis of the Government of the United States of America undermines its resistance to the clear and cogent evidence given by Professor Janus, amply supported by the material on which he relies. In those circumstances, I conclude that there is a real risk that if returned Mr Sullivan will be the subject of an order of civil commitment. Accordingly, it remains to consider whether such an order would constitute a flagrant denial of his rights enshrined in Art. 5 or Art. 6.

[. . .]

36. I emphasise again that my judgment rests solely on my conclusion that there is a real risk that if extradited the appellant might be subject to an order for civil commitment within Minnesota and that that amounts to a risk that he would suffer a flagrant denial of his rights enshrined in Art. 5.1. Because the United States may now wish to give an assurance, and because if I allow the appeal that may be of no avail (s.104(1)(a) and (5)), I should hear further argument as to disposal of the appeal on handing down this judgment. I would make no order on the appeal under s.108.

[36] In brief but concurring reasons, Justice Eady said:

37. I agree. The crux of the matter is the assessment of risk to be made on the evidence available to this court. Instead of becoming clearer with the passage of time, the position is now more uncertain than was the case before the District Judge. I too would conclude the material before us reveals that there is a more

> than fanciful risk that the appellant would become subject to the civil commitment process in the State of Minnesota and, accordingly, that he would suffer a flagrant denial of his rights under Art 5.1. That assessment of risk is borne out by the absence of any undertaking up to this point.

Information sought from U.S. authorities respecting MSOP

[37] Following Mr. Carroll bringing his concerns with the MSOP to the Minister's attention, the Canadian Department of Justice through its International Assistance Group (IAG) sought information from the United States Department of Justice (USDOJ). The record does not contain any direct communications from the USDOJ authorities; rather, the information received is captured in briefing memoranda prepared for the Minister by the IAG.

[38] In short, the briefing memoranda to the Minister included two key representations: (1) USDOJ's opinion that Mr. Carroll (assuming he was convicted) was unlikely to be civilly committed following the completion of his penal custodial sentence because it was unlikely he would meet the admission criteria; and, (2) given the USDOJ's opinion that Mr. Carroll is unlikely to be committed civilly, it is not anticipated that the *Karsjens* decision will impact him.

[39] As a result of the above, any impact the *Karsjens* decisions might have on Mr. Carroll's risk level was not examined by the Minister. The decision was effectively ignored for the purpose of the surrender determination. Later, I will address what use the Minister could and should have made of the MSOP concerns. I will also address the commitment criteria in more detail and the equivocal language used by the USDOJ in the provision of its opinion.

[40] No assurances where provided by United States officials and none were requested by the Minister; a point to which I will return later.

The Ministers decision

[41] The Minister concluded:

> In light of your submissions, information was obtained from the United States Department of Justice (USDOJ) on the civil commitment process in the State of Minnesota and whether, if convicted, Mr. Carroll could be subject to civil commitment proceedings there at the completion of any custodial sentence he may receive. In addition, information was obtained from the USDOJ about the decision of the United States District Court, District of Minnesota, in *Karsjens,*

supra, and its impact, if any, on the administration of the MSOP as it may apply to Mr. Carroll if convicted of the offences for which his extradition is sought. The salient information has been provided to you.

[. . .]

I am satisfied that Mr. Carroll's surrender would not shock the conscience of Canadians, or be unjust or oppressive pursuant to section 44(1)(a) of the *Act*. In Mr. Carroll's case, **based on the facts and evidence available**, the Isanti County Attorney's Office, the competent United States authority to prosecute Mr. Carroll and commence civil commitment proceedings against him, is of the opinion that Mr. Carroll does not meet the criteria for civil commitment, as defined in the applicable Minnesota Statutes.

[. . .]

However, even if the United States sentencing court or the Minnesota Commissioner of Prisons requests the commencement of civil commitment proceedings, the decision to initiate such proceedings remains with the Isanti County Attorney's Office. The Isanti County Attorney's Office advised that **based on the facts and evidence available** in Mr. Carroll's case, he does not meet the criteria to be regarded as a person with a "sexual psychopathic personality" or as a "sexually dangerous person", which are preconditions for the civil commitment of an offender in Minnesota.

Specifically, the Isanti County Attorney's Office advised that there is no evidence of Mr. Carroll's prior criminal history, including sexual offences, or emotional instability or impulsiveness related to sexual matters. Further, although Mr. Carroll's alleged conduct amounts to harmful sexual conduct, Mr. Carroll does not meet the rest of the criteria such that he is regarded as a sexually dangerous person. According to the Isanti County Attorney's Office, the evidence does not demonstrate that Mr. Carroll "has manifested a sexual, personality, or other mental disorder or dysfunction", as a result of which he is "likely to engage in acts of harmful sexual conduct."

While the sentencing court or the Commissioner of Prisons may make a preliminary determination that a petition for civil commitment should be made, preliminary determinations are forwarded to the county attorney of the county of criminal conviction for review and final determination. The sentencing court or the Commissioner of Prisons cannot unilaterally subject an offender to civil commitment proceedings in Minnesota but rather make a recommendation to the county attorney responsible for the prosecution of the offender. As noted previously, the attorney responsible for Mr. Carroll's prosecution (Isanti County Attorney's Office) has advised that the evidence in **Mr. Carroll's case suggests that he does not meet the criteria for civil commitment** pursuant to Minnesota legislation and, as a result, not only is it unlikely that a petition for Mr. Carroll's civil commitment will be forwarded to the county attorney but that the county attorney will proceed on such a petition.

> Further, according to the USDOJ, the District (Isanti) Court has never referred an offender facing similar allegations and with a criminal history akin to that of Mr. Carroll's for civil commitment proceedings.
>
> As Mr. Carroll is unlikely to be subject to the civil commitment process in the United States, it is not anticipated that the decision in *Karsjens*, *supra*, will affect Mr. Carroll, if he is convicted of the offences for which his extradition is sought.
> [. . .]
>
> In all of the circumstances, I am satisfied that Mr. Carroll's surrender to the United States would not be contrary to section 7 of the *Charter*, and would not be unjust or oppressive on the basis of potential civil commitment at the completion of any custodial sentence Mr. Carroll may receive if convicted in the United States of some or all of the offences for which his extradition is sought.
>
> [Emphasis added]

[42] Leading up to the foregoing analysis and her conclusion to surrender, the Minister did summarily list the concerns Mr. Carroll brought to her attention respecting the MSOP. However, with respect, she did no more than that. She did not conduct any risk analysis on her own as to whether the risk of commitment was fanciful, certain or somewhere in between. Rather, she extracted the USDOJ representations from the briefing memoranda and accepted them on their face without weighing them against the balance of the evidence before her.

Issue

[43] The parties agree that the sole issue for determination on this judicial review application is whether the Minister erred in concluding Mr. Carroll's surrender would not be unjust or oppressive in the circumstances.

Standard of review

[44] The applicable standard of review is the deferential standard of reasonableness. That is so even where the surrender decision engages *Charter* rights. The role of this Court is not to reweigh the relevant factors and substitute its own view. Nor does reasonableness mean blind acceptance of the Minister's assessment. Our task is to decide whether the Minister considered the relevant factors and reached a defensible conclusion that falls within a range of reasonable outcomes given the facts and the applicable law.

[45] Ministerial surrender decisions are viewed as being primarily political in nature and reside at the extreme legislative end of the continuum of administrative

decision making. Considerable deference is to be afforded. This aligns with appreciating the Minister's expertise in the realm of Canada's international relations. However, the Minister's discretion is not absolute. It must be exercised within the bounds of the restrictions set out in s. 44(1) of the *Extradition Act* and the *Charter* (see *United States v. Lake*, 2008 SCC 23).

[46] In ¶ 21-41 of *Lake,* the Supreme Court of Canada set out an instructive articulation of the Minister's role in the extradition process. When applying the reasonableness standard in an extradition context, the Supreme Court of Canada directions included the following:

> [31] The Minister is also often asked to consider whether surrender would violate an individual's rights under s. 7 of the *Charter*. The test that has been applied is whether ordering extradition would "shock the conscience" (*Schmidt*, at p. 522), or whether the fugitive faces "a situation that is simply unacceptable" (*Allard*, at p. 572). In *Schmidt*, La Forest J. emphasized that deference is owed to the Minister's assessment:
>
> > The courts have the duty to uphold the Constitution. Nonetheless, this is an area where the executive is likely to be far better informed than the courts, and where the courts must be extremely circumspect so as to avoid interfering unduly in decisions that involve the good faith and honour of this country in its relations with other states. In a word, judicial intervention must be limited to cases of real substance. [p. 523]
>
> [. . .]
>
> [34] This Court has repeatedly affirmed that deference is owed to the Minister's decision whether to order surrender once a fugitive has been committed for extradition. The issue in the case at bar concerns the standard to be applied in reviewing the Minister's assessment of a fugitive's *Charter* rights. Reasonableness is the appropriate standard of review for the Minister's decision, regardless of whether the fugitive argues that extradition would infringe his or her rights under the *Charter*. As is evident from this Court's jurisprudence, to ensure compliance with the *Charter* in the extradition context, the Minister must balance competing considerations, and where many such considerations are concerned, the Minister has superior expertise. The assertion that interference with the Minister's decision will be limited to exceptional cases of "real substance" reflects the breadth of the Minister's discretion; the decision should not be interfered with unless it is unreasonable (*Schmidt*) (for comments on the standards of correctness and reasonableness, see *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, 2008 SCC 9).
>
> [. . .]

> [41] Reasonableness does not require blind submission to the Minister's assessment; however, the standard does entail more than one possible conclusion. The reviewing court's role is not to re-assess the relevant factors and substitute its own view. Rather, the court must determine whether the Minister's decision falls within a range of reasonable outcomes. To apply this standard in the extradition context, a court must ask whether the Minister considered the relevant facts and reached a defensible conclusion based on those facts. I agree with Laskin J.A. that the Minister must, in reaching his decision, apply the correct legal test. The Minister's conclusion will not be rational or defensible if he has failed to carry out the proper analysis. If, however, the Minister has identified the proper test, the conclusion he has reached in applying that test should be upheld by a reviewing court unless it is unreasonable. This approach does not minimize the protection afforded by the *Charter* . It merely reflects the fact that in the extradition context, the proper assessments under ss. 6(1) and 7 involve primarily fact-based balancing tests. Given the Minister's expertise and his obligation to ensure that Canada complies with its international commitments, he is in the best position to determine whether the factors weigh in favour of or against extradition.

Analysis

[47] Section 44(1)(a) of the *Extradition Act* requires the Minister to refuse surrender when satisfied that the surrender would be unjust or oppressive having regard to all the relevant circumstances. Surrender will also be refused if found to be contrary to principles of fundamental justice protected by s. 7 of the *Charter*. As recognized by the Supreme Court of Canada in *Lake*, there is overlap in the protections and similar considerations apply to both assessments:

> [24] … on the nature of the relationship between s. 44(1) of the *Extradition Act* and s. 7 of the *Charter*… it is evident that similar considerations may often apply to both these provisions and that the protections they afford overlap somewhat. Where surrender would be contrary to the principles of fundamental justice, it will also be unjust and oppressive: *Bonamie, Re* (2001), 293 A.R. 201 (C.A.). …

[48] Respecting the Minister's duty to assess whether surrender would violate an individual's rights under s. 7 of the *Charter*, the SCC said this in *Lake*:

> [32] In *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779, the majority of this Court explained that the proper approach is to balance the factors for and against extradition in the circumstances in order to determine whether extradition would tend to "shock the conscience". In *United States v. Burns*, [2001] 1 S.C.R. 283, 2001 SCC 7, the Court reaffirmed the *Kindler* approach but added that the words "shock the conscience" should not "be allowed to obscure the ultimate assessment that is required: namely whether or not the extradition is in accordance

> with the principles of fundamental justice" (para. 68). In making this assessment, the relevant factors may be specific to the fugitive, such as age or mental condition, or general, such as considerations associated with a particular form of punishment.

[49] In *United States v. Burns*, 2001 SCC 7, the Supreme Court provides clarification of the term "shock the conscience". The Court said:

> [68] Use of the "shocks the conscience" terminology was intended to convey the exceptional weight of a factor such as the youth, insanity, mental retardation or pregnancy of a fugitive which, because of its paramount importance, may control the outcome of the *Kindler* balancing test on the facts of a particular case. The terminology should not be allowed to obscure the ultimate assessment that is required: namely whether or not the extradition is in accordance with the principles of fundamental justice. The rule is <u>not</u> that departures from fundamental justice are to be tolerated unless in a particular case it shocks the conscience. An extradition that violates the principles of fundamental justice will <u>always</u> shock the conscience. The important inquiry is to determine what constitutes the applicable principles of fundamental justice in the extradition context.
>
> [69] The "shocks the conscience" language signals the possibility that even though the rights of the fugitive are to be considered in the context of other applicable principles of fundamental justice, which are normally of sufficient importance to uphold the extradition, a particular treatment or punishment may sufficiently violate our sense of fundamental justice as to tilt the balance against extradition. Examples might include stoning to death individuals taken in adultery, or lopping off the hands of a thief. The punishment is so extreme that it becomes the controlling issue in the extradition and overwhelms the rest of the analysis. . . . (emphasis in original)

[50] Mr. Carroll argues the risk of indefinite detention through the MSOP, without any meaningful avenue for release and after having completed all imposed penal sanctions, is contrary to his protected *Charter* rights. He claims his surrender in these circumstances would shock the conscience of ordinary Canadians and is unjust and oppressive.

[51] Mr. Carroll argues that the record does not support the conclusion that there was little or low risk of civil commitment. He claims the Minister failed to properly consider the evidence before her and conduct a proper analysis. As a result, her decision is not defensible. He also points out that even "little risk" or "unlikely risk" or "low risk" is still a risk and given the framework of the MSOP

and the current state of the law in Minnesota, it is a real risk nevertheless. He claims the USDOJ's minimization of his risks is self serving.

[52] The Attorney General of Canada on behalf of the Minister, contends that the Minister was entitled to rely on the representations from the USDOJ and she did not err in doing so. Further, her surrender decision falls within the range of acceptable outcomes based on the record and should not be disturbed.

[53] I am mindful the Minister is entitled to a wide margin of deference given the political nature of the decision and her expertise. I also recognize the Minister is entitled to request and rely upon the information and/or opinions obtained from the USDOJ (see *Lunn v. Canada (Minister of Justice*), 2016 NSCA 49 at ¶ 57). However, surely more is required than blind reliance. The information received from the USDOJ minimizing Mr. Carroll's risk exposure should be considered in context with the balance of the relevant evidence before the Minister. As the SCC said in *Lake*, when applying the reasonableness standard in the extradition context, a court must ask whether the Minister considered the relevant facts and reached a defensible conclusion based on those facts. The Minister's conclusion will not be rational or defensible if she has failed to carry out a proper analysis.

[54] Although the Minister said she considered both separately and commutatively the submissions Mr. Carroll's counsel put forth on his behalf, it is apparent from her decision that in arriving at her conclusion that his civil commitment was unlikely, she did not consider all the facts and circumstances together. Silos were created and some material facts and circumstances where excluded from her analysis. This lead to a failure to consider all the relevant facts and conduct a proper analysis.

[55] The Minister relied heavily, if not exclusively, on the USDOJ's representations to conclude there was little risk of Mr. Carroll's civil commitment should he be found guilty. This finding underpinned her surrender decision. She accepted the representations on their face, treating them in a vacuum or silo to eliminate the risk of civil commitment. Having then eliminated or reduced the risk of commitment to "unlikely", the Minister did not give any meaningful consideration or undertake any analysis of the serious shortcomings with the MSOP, as were clearly found by the district judge and brought to the Minister's attention through several written submissions provided by Mr. Carroll's counsel.

[56] The Minister, after reviewing the representations from the USDOJ respecting why it opined civil commitment was unlikely, said this:

> As Mr. Carroll is unlikely to be subject to the civil commitment process in the United Sates, it is not anticipated that the decision in *Karsjens, supra*, will affect Mr. Carroll, if he is convicted of the offences for which his extradition is sought. [. . .]

[57] Although the decision had been stayed by the Court of Appeals, that does not mean the decision should be ignored. The MSOP had been declared unconstitutional given the egregious violations of offenders' rights. Grave problems were found not only once committed but through the assessment and the commitment process itself. In addition, it is fair to say there was overarching political pressure imposed on those responsible for executing the MSOP. In light of these findings of the district judge respecting the serious problems with the risk assessment process and that offenders who did not meet the criteria were still committed, it is cold comfort for the USDOJ to opine that Mr. Carroll does not appear to meet the admission criteria. The relevant shortcomings identified in the *Karsjens* decision are surely informative of the assessment of whether Mr. Carroll is at risk of civil commitment. The problems identified place the "likeliness of commitment assessment" in a fuller and more proper context.

[58] The Minister was required to consider all relevant information. It was wrong for the Minister to segregate the serious problems with the MSOP from any assessment of risk as to whether it was likely or unlikely Mr. Carroll might find himself caught up in a very troubling civil commitment system—one which, if committed, he conceivably might never get out of alive unless the system is reformed.

[59] That error alone is sufficient to set aside the surrender order. However, I will go further and address the reliability of the USDOJ representations given the context of Mr. Carroll's circumstances, the information available and the civil commitment process itself. This information was laid before the Minister, but did not find its way into her required analysis of risk. Again, as noted, no real analysis of risk was undertaken because the Minister simply accepted the USDOJ's position on risk.

[60] Mr. Carroll makes a compelling argument that any assessment of whether there is good cause to file a petition for his civil commitment is premature and further, any available information the USDOJ relied upon is scant and insufficient. Based on the record, there is merit to that argument.

[61] My colleague, Chief Justice MacDonald, states at ¶ 89 that the advice from the United States authority "has made it clear that Mr. Carroll would not be a candidate because he simply does not qualify". With respect, the advice from the USDOJ is glaringly equivocal. It is coached in uncertain terms such as "unlikely" and subject to the caveat that it is only based on "available information" which "suggests" Mr. Carroll does not meet the criteria for civil commitment.

[62] The commitment criteria are a designation of either a sexually dangerous person (SDP) or a sexually psychopathic personality (SPP). A person with an SPP is someone found by a court to have:

> . . . such conditions of emotional instability, or impulsiveness of behavior, or lack of customary standards of good judgment, or failure to appreciate the consequences of personal acts, or a combination of any of these conditions, which render the person irresponsible for personal conduct with respect to sexual matters, if the person has evidenced, by a habitual course of misconduct in sexual matters, an utter lack of power to control the person's sexual impulses and, as a result, is dangerous to other persons. (See Minn. Stat. § 253D.02, subd. 15; Minn. Stat. § 253D.07.)

[63] An SDP has a lower threshold and is defined as a person who has: (1) engaged in a course of harmful sexual misconduct; (2) has manifested a sexual, personality, or other mental disorder or dysfunction; and (3) as a result, is likely to engage in acts of harmful sexual conduct in the future and, it is not necessary to prove an inability to control sexual impulse. (See Minn. Stat. § 253D.02, subd. 16; Minn. Stat. § 253D.07.)

[64] Remember, the petition for commitment is usually filed shortly before the offender is scheduled to be released from prison, after having served the required prison term. If convicted, Mr. Carroll is facing a very lengthy prison term. There appear to be many material unknowns between then (completion of his sentence) and now: including, what actual evidence will be adduced at trial and whether the sentencing judge might refer. Next, the results of any tests/risk assessments conducted by the professionals within the Department of Corrections are unknown. Mr. Carroll must undergo this screening while incarcerated to determine if his case will be referred to the prosecuting attorney's office for consideration of a civil commitment petition. The screening and testing process itself appears to be quite an in-depth process and typically does not happen until towards the end of any lengthy sentence. (See *Minnesota Department of Corrections Sex Offender Civil Commitment Screening Policy* No: 205, 200.) His in-custody behaviour and

response to treatment is also factored into the assessment of whether he should be referred to MSOP. As in the *Sullivan* case, these are all unknowns at this time.

[65] The missing information, particularly the risk assessment done prior to release from prison, is an integral part of and informs any determination as to whether Mr. Carroll will meet the commitment criteria for either a sexually dangerous person (SDP) or a sexually psychopathic personality (SPP). Without this information how can the USDOJ assess with any reasonable degree of confidence or reliability, whether a petition for civil commitment will be filed and if so granted? In *Sullivan*, it argued it could not. The position advanced by the USDOJ in Mr. Carroll's case is noticeably inconsistent with its position before the appeal court in *Sullivan*.

[66] An IAG briefing memorandum contains this statement which is used and relied on by the Minister as a mitigating factor against the risk of civil commitment: *"The USDOJ advised that the information available in Mr. Caroll's case suggests that Mr. Carroll was aware of his actions and appreciated their illegal nature."* The information does not square with the record. Mr. Carroll has never met with United States authorities. He denies all wrongdoing and this statement is not supported anywhere in the record, including reports from investigating authorities which are contained in the record. Reliance on it in this context is questionable, as is its relevance, as awareness and ability to appreciate the illegality of one's actions does not appear to preclude a designation of an individual as a SDP or an SPP. Further, Mr. Carroll's alleged sexual misconduct is serious, no doubt harmful and falls at the high end of the spectrum. He stands accused of frequent invasive sexual abuse of a vulnerable person in his care over a five-year period.

[67] The Minister also relies on the USDOJ's statement that ". . .there's no evidence of [Mr. Carroll's] prior criminal history, including sexual offences, or emotional instability or impulsiveness related to sexual actions." Again, this statement must be assessed in context. Specifically, there is "no evidence" because little is known about Mr. Carroll at this stage.

[68] The foregoing negates the strength and reliability of the USDOJ representations and this information should have been carefully considered by the Minister. I am satisfied that analysis was not conducted. Rather, the Minister took comfort in and relied on the representations, not assurances, of the USDOJ without assessing whether the foregoing factors and the *Karsjens* decision eroded the

strength and reliability of the USDOJ's representations. Although considerable deference is owed to the Minister, in my view, on this record, it is not defensible (reasonable) for her to simply rely upon the representations from the USDOJ that Mr. Carroll is an unlikely candidate for a petition for civil commitment. Significant liberty interests are engaged by this case. More was required of the Minister in assessing whether Mr. Carroll's surrender was unjust or oppressive (s. 44 (1)(a) of the *Extradition Act*) or violated principles of fundamental justice (s. 7 *Charter*). Without doing more, the Minister's surrender decision is unreasonable and cannot stand.

[69] Had the Minister considered all the relevant facts and circumstances, a proper risk analysis of civil commitment could have been conducted. If risk of indefinite civil commitment (the equivalent of life without parole) is present, the Minister must determine whether that infringes Mr. Carroll's s. 7 *Charter* rights. Her task then would be to analyse whether that particular treatment in the requesting state sufficiently violates our sense of fundamental justice that the balance will tip against extradition. In *Lake*, the Supreme Court said the following respecting the balancing test the Minister is to undertake:

> [38] Similarly, the Minister's assessment of whether extradition accords with the fugitive's s. 7 rights involves a balancing test. As I mentioned above, the Minister must weigh the factors for and against extradition to determine whether the circumstances are such that extradition would "shock the conscience". In *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1, this Court considered the appropriate standard of review for the Minister's decision whether a refugee faces a substantial risk of torture upon deportation. In its view, the Minister's decision in that context requires a fact-driven inquiry involving the weighing of various factors and possessing a "negligible legal dimension" (para. 39). Accordingly, the Court concluded that the Minister's decision would be entitled to deference upon judicial review.
>
> [39] Whether extradition would "shock the conscience" involves a similar type of inquiry. The Minister must balance the individual's circumstances and the consequences of extradition against such factors as the seriousness of the offence for which extradition is sought and the importance of meeting Canada's international obligations and generally ensuring that Canada is not used as a safe haven by fugitives from justice. This inquiry will also often involve consideration of the protections that would be available to the fugitive and the conditions he or she would face in the requesting state. [. . .]

[70] I note that, even on the USDOJ's own representations, the best conclusion is low risk of commitment, not no risk. The Minister did not turn her mind to whether

a low, but a real risk of civil indefinite commitment is acceptable. Is that a denial of fundamental justice that would shock the conscience of ordinary Canadians? If so, is it unjust or oppressive? By analogy, would a low but real risk of being executed be acceptable? If unacceptable risk of civil detention is found, is this a case where the Minister should exercise her discretion to seek assurances? On this record, the Minister could and should have turned her mind to these considerations but did not, particularly when the MSOP has been described as a draconian system, said to be the worst and most oppressive in the United States.

[71] Based on the entire record, the risk level Mr. Carroll faces is not fanciful nor is it certain. The risk of civil commitment lies somewhere in between. The important task for the Minister was to weigh all the relevant factors in assessing risk and in her balancing duty under s. 7 of the *Charter*. In my view, by excluding relevant considerations from that fact-driven inquiry, the Minister fell into error.

[72] Before setting out the remedy, there are a few additional points in the Minister's decision I will address. Although not determinative, they are worth noting as the Minister seems to take comfort in them. But upon a closer look, the comfort is either misplaced or uncertain. For example, the Minister compares the MSOP to Canada's mental health laws, where those posing safety risks can be civilly committed. The two systems are far from comparable. Further, any review will illustrate that our built-in procedural protections and safeguards are markedly different than the MSOP.

[73] The Minister also notes that because Mr. Carroll is a Canadian citizen, he will be a candidate for removal to Canada at the completion of any penal sentence and he could apply to serve any penal sentence imposed in Canada. Neither option is, by any means, a certainty and both are procedurally complex. In short, these options cannot be seen to counterbalance a situation where Mr. Carroll's risk of indefinite civil detention is real.

[74] In the final IAG briefing memorandum to the Minister, the following was included:

> The USDOJ advised that because Mr. Carroll is not a United States citizen and has no status in the United States, should he be convicted of some or all of the offences for which his extradition is sought, he will be a candidate for removal to Canada by United States immigration authorities upon completion of any sentence

> he may receive. **Minnesota authorities may choose not to pursue civil commitment proceedings** and notify United States immigration authorities for deportation to Canada at the conclusion of his criminal proceedings.
>
> [Emphasis added]

[75] What is of note is the express statement that at the end of the day, without assurances, the choice to petition rests in the hands of the State of Minnesota and the risk to Mr. Carroll remains live, at least to some degree, until that decision is ultimately made.

Remedy/Directions

[76] The powers of this Court on an application for judicial review of a surrender order are set out in s. 56(7) of the *Extradition Act*. It provides:

> (6) On an application for judicial review, the court of appeal may
>
> (a) order the Minister to do any act or thing that the Minister has unlawfully failed or refused to do or has unreasonably delayed in doing; or
>
> (b) declare invalid or unlawful, quash, set aside, set aside and refer back for determination in accordance with any directions that it considers appropriate, prohibit or restrain the decision of the Minister referred to in subsection (1).

[77] Following oral submissions on appeal, the panel requested and received further written submissions respecting the relief to be granted should this Court find the surrender decision unreasonable. In this event, both parties request the surrender order be set aside and referred back to the Minister for redetermination as opposed to this Court setting aside the order.

[78] The latter option, although available, would mean this Court would be stepping into the place of the Minister to make a discretionary decision that is largely political in nature. The Attorney General argues this power is rarely exercised and only in exceptional circumstances. For example, where the Court identified a legal reason why surrender was wrong in law or there was nothing further the Minister could do, whether in seeking assurances or otherwise (see *United States v. Leonard*, 2012 ONCA 622), which is not the case here.

[79] I noted earlier, the Minister did not seek assurance from the United States authorities that if Mr. Carroll were convicted they would not petition for his civil

commitment. There is no indication in the record that this was considered or requested by Mr. Carroll.

[80] In its supplemental submissions, the Attorney General also addressed the ability of this Court to order the Minister to seek assurances should the matter be referred for redetermination. The Attorney General relying on *United States of America v. Sheppard*, 2016 QCCA 1082, contends this Court can make no such order as that decision lies squarely within the discretion of the executive and there are no exceptional circumstances such as in *United States v. Burns*, 2001 SCC 7 where the Court required assurances. *Burns* was a death penalty case where the Supreme Court determined assurances were constitutionally required. However, imposed assurances are not limited to only death penalty cases. As the Supreme Court recognized in *Lake* at ¶ 33 "…*Burns* thus serves as an example of the kind of critical circumstances in which a reviewing court will interfere with the Minister's decision."

[81] Whether the Attorney General's restrictive view on this Court's authority to order assurances is correct, I need not address. I am satisfied that the proper remedy is to set the surrender order aside and remit for redetermination. Once the Minister has properly assessed Mr. Carroll's risk level based on all the relevant circumstances and conducted the s. 7 balancing test to determine if the level of risk offends principles of fundamental justice, consideration of the diplomatic remedy of assurance is best left to the Minister at this time.

[82] As in the *Sullivan* decision, the issue of assurance was to be contemplated, following the court's determination that Mr. Sullivan faced a real risk of civil detention. The court said:

> 36. I emphasise again that my judgment rests solely on my conclusion that there is a real risk that if extradited the appellant might be subject to an order for civil commitment within Minnesota and that that amounts to a risk that he would suffer a flagrant denial of his rights enshrined in Art. 5.1. Because the United States may now wish to give an assurance, and because if I allow the appeal that may be of no avail (s.104(1)(a) and (5)), I should hear further argument as to disposal of the appeal on handing down this judgment. I would make no order on the appeal under s.108.

[83] Also, in *Provost v. Attorney General of Canada (United States of America)*, 2015 QCCA 1172, the court dismissed Mr. Provost's application for judicial review. He was facing extradition to the State of Virginia to answer to outstanding sexual assault charges. Virginia has a civil commitment regime for convicted sex

offenders. His main argument was that the Minister erred in concluding it was unnecessary to seek assurances not to petition for commitment. In assessing the application, the court made specific mention of the safeguards available to offenders in Virginia and distinguished this from the MSOP in the State of Minnesota.

[84] It is in the interests of justice that Mr. Carroll be tried for these serious offences. His extradition is sought for this purpose, presumably, not also for the added purpose of civil commitment. Although extradition and prosecution serve the interests of justice, it cannot be at the cost of violating principles of fundamental justice.

[85] I now turn to provide directions to the Minister. In assessing Mr. Carroll's risk of indefinite civil detention, I would direct the Minister to: (1) consider all the relevant information before her including the relevant factual findings in the *Karsjens* case (assuming these findings are not disturbed by the ongoing litigation); (2) consider whether any determination of civil commitment is premature given the factors set out in ¶ 61-67 herein; and (3) once the level of risk is assessed, consider whether an assurance from the United States authority not to petition for civil commitment is required. In deciding whether an assurance is required, the Minister must first conduct a proper s. 7 analysis to determine if the particular treatment (MSOP) violates our principles of fundamental justice. These directions do not restrict the Minister from other relevant considerations as she deems appropriate.

Conclusion

[86] Interfering with the Minister's discretion in these politically sensitive decisions is not to be undertaken lightly. In my view, this is a case of real substance which warrants interference. For the foregoing reasons, I would: grant the application for judicial review; set aside the surrender order; and remit the matter back for redetermination upon the directions set out. No costs were sought. None are ordered.

Van den Eynden, J.A.

Concurred in:

Saunders, J.A.

Dissenting Reasons (MacDonald, C.J.N.S.):

[87] Respectfully, I disagree with the majority ruling. Instead, for the reasons that follow, I would dismiss the application for judicial review.

[88] First of all, the Minister's decision is comprehensive and addresses every issue identified by Mr. Carroll. It reveals no error in fact or principle. Instead, in my view, Mr. Carroll simply disagrees with the outcome.

[89] As to the spectre of Mr. Carroll being subjected to Minnesota's civil commitment proceedings, the Minister made a legitimate factual finding that there was no reasonable risk of that happening. Specifically, such proceedings can be instigated only by the Minnesota Crown Attorney's office. That same office has made it clear that Mr. Carroll would not be a candidate because he simply does not qualify. The Minister explained:

> In considering whether the possibility of civil commitment renders Mr. Carroll's extradition to the United States unjust or oppressive, I am mindful of the fact that the Minnesota civil commitment proceedings are not criminal. The Minnesota civil commitment process, like Canada's mental health laws, exists to protect the community from harm while providing treatment for high risk violent sexual offenders, where certain strict criteria have been met. In Canada, such legislation allows for the involuntary detention in a mental health facility of a person who is deemed to suffer from a mental disorder, the nature of which results in the person being a danger to himself or others, or which will result in imminent and serious physical impairment to the person.
>
> I am satisfied that Mr. Carroll's surrender would not shock the conscience of Canadians, or be unjust or oppressive pursuant to section 44(1)(a) of the *Act*. In Mr. Carroll's case, based on the facts and evidence available, the Isanti County Attorney's Office, the competent United States authority to prosecute Mr. Carroll and commence civil commitment proceedings against him, is of the opinion that Mr. Carroll does not meet the criteria for civil commitment, as defined in the applicable Minnesota Statutes.
>
> According to the Isanti County Attorney's Office, the information available in Mr. Carroll's case suggests that Mr. Carroll was aware of his actions and appreciated their illegal nature. As such, if Mr. Carroll is convicted of the offences for which his extradition is sought, it is unlikely that the sentencing court will determine that a petition for civil commitment should be commenced.
>
> However, even if the United States sentencing court of the Minnesota Commissioner of Prisons requests the commencement of civil commitment proceedings, the decision to initiate such proceedings remains with the Isanti

> County Attorney's Office. The Isanti County Attorney's Office advised that based on the facts and evidence available in Mr. Carroll's case, he does not meet the criteria to be regarded as a person with a "sexual psychopathic personality" or as a "sexually dangerous person", which are preconditions for the civil commitment of an offender in Minnesota.
>
> Specifically, the Isanti County Attorney's Office advised that there is no evidence of Mr. Carroll's prior criminal history, including sexual offences, or emotional instability or impulsiveness related to sexual matters. Further, although Mr. Carroll's alleged conduct amounts to harmful sexual conduct, Mr. Carroll does not meet the rest of the criteria such that he is regarded as a sexually dangerous person. According to the Isanti County Attorney's Office, the evidence does not demonstrate that Mr. Carroll "has manifested a sexual, personality, or other mental disorder or dysfunction", as a result of which he is "likely to engage in acts of harmful sexual conduct."

[90] The Isanti Crown Attorney's position on this matter has been clearly documented. These are, therefore, unassailable factual findings that we ought not disturb. See *Karas v. Canada (Minister of Justice and Attorney General)*, 2009 BCCA 1 at para. 15 and 32.

[91] I can only presume that, on the strength of these findings, the Minister felt that further assurances would not be necessary. This is a reasonable conclusion, in my respectful view.

[92] Furthermore, as the Minister highlighted, Mr. Carroll would also: (a) be entitled to apply to have his sentence served in Canada; and (b) in any event expected to be returned to Canada after serving his sentence:

> I also note that the USDOJ has advised that because Mr. Carroll is not an American citizen, he will be a candidate for removal to Canada at the completion of any penal sentence.
>
> Further, pursuant to the *Treaty between Canada and the United States of America on the Execution of Penal Sentences*, as a Canadian citizen, Mr. Carroll could apply to have any United States sentence that may be imposed against him transferred to be served in Canada.

[93] In summary, whether or not to seek further assurances was the Minister's decision to make. As the Supreme Court of Canada made abundantly clear in *R. v. Schmidt*, [1987] 1 SCR 500:

> [63] This is an area where the executive is likely to be far better informed than the courts, and where the courts must be extremely circumspect so as to avoid

> interfering unduly in decisions that involve the good faith and honour of this country in its relations with other states.

[94] Before concluding, I will address four specific concerns raised by the majority. Firstly, relying on the United States District Court's decision in *Karsjens*, they highlight the spectre of the State locking up Mr. Carroll and throwing the proverbial keys away, should he be committed under this program. As I have detailed above, the Minister feels that there is no reasonable risk of Mr. Carroll entering the program. In any event, in setting aside the District Court's order, the United States Court of Appeals, Eighth Circuit did not share the trial judge's constitutional concern. Instead it concluded this about the impugned legislation and its use in that case (at pp. 21-23):

> MCTA is facially constitutional because it is rationally related to Minnesota's legitimate interests. The district court expressed concerns about the lack of periodic risk assessments, the availability of less restrictive alternatives, and the processes for seeking a custody reduction or a release. MCTA provides 'proper procedures and evidentiary standards' for a committed person to petition for a reduction in his custody or his release from confinement... Any committed person can file a petition for reduction in custody…The petition is considered by a special review board consisting of experts in mental illness and at least one attorney…That panel conducts a hearing and issues a report with recommendations to a judicial appeal panel consisting of Minnesota district judges appointed to the judicial appeal panel by the Chief Justice of the Supreme Court…Through this process, the committed person 'has the right to be represented by counsel' and the court 'shall appoint a qualified attorney to represent the committed person if neither the committed person nor other provided counsel.'…Appeal of the decision of the special judicial panel may be taken the Minnesota Court of Appeals. Finally, a committed person is entitled to a new petition six months after the prior petition is concluded.
>
> We conclude that this extensive process and the protections to persons committed under MCTA are rationally related to the State's legitimate interest of protecting its citizens from sexually dangerous persons or persons who have a sexual psychopathic personality. Those protections allow committed individuals to petition for a reduction in custody, including release; therefore, the statute is facially constitutional.
>
> ii. As-Applied Challenge
>
> We agree with the state defendants that much of the district court's 'as-applied' analysis is not a consideration of the application of MCTA to the class plaintiffs but is a criticism of the statutory scheme itself. For instance, the court found that the statute was unconstitutional as applied to the plaintiffs because the state defendants do not conduct periodic risk assessments. However, the class plaintiffs

> acknowledge that MCTA does not require periodic risk assessments but those assessments are performed whenever a committed person seeks a reduction in custody. The district court also found as-applied violations in aspects of the treatment received by the committed persons, specifically concluding that the treatment program's structure has been an 'institutional failure' and lacks a meaningful relationship between the program and an end to indefinite detention. However, we have previously held that although 'the Supreme Court has recognized a substantive due process right to reasonably safe custodial conditions, [it has not recognized] a broader due process right to appropriate or effective or reasonable treatment of the illness or disability that triggered the patient's involuntary confinement.'…Further, as the Supreme Court recognized, the Constitution does not prevent 'a State from civilly detaining those for whom no treatment is available.'... Nevertheless, as discussed previously, to maintain an as-applied due process challenge, the class plaintiffs have the burden of showing the state actors' actions were conscience-shocking and violate a fundamental liberty interest…
>
> None of the six grounds upon which the district court determined the state defendants violated the class plaintiffs' substantive due process rights in an as-applied context satisfy the conscience-shocking standard. Having reviewed these grounds and the record on appeal, we conclude that the class plaintiffs have failed to demonstrate that any of the identified actions of the state defendants or arguable shortcomings in the MSOP were egregious, malicious, or sadistic as is necessary to meet the conscience-shocking standard. Accordingly, we deny the claims of an as-applied due process violation.
>
> III.
>
> Accordingly, we reverse the district court's finding of a constitutional violation and vacate the injunctive order. We remand this matter to the district court for further proceedings on the remaining claims in the Third Amended Complaint.

[95] Secondly, the majority faults the Minister for taking a "silo" approach to the issues raised by Mr. Carroll. This, they feel, prevented her from carrying out the requisite "meaningful consideration or analysis". In my respectful view, the Minister did no such thing. Instead she simply made the effort to address each of Mr. Carroll's concerns. In the end, considering them all, she concluded:

> I have carefully considered both separately and cumulatively all of the submissions placed before me on Mr. Carroll's behalf and I conclude that it would not be unjust or oppressive in all of the circumstances, nor would it violate his *Charter* rights, to surrender Mr. Carroll to the United States for prosecution on the offences for which his extradition is sought. I have also determined that there are no other considerations under the *Treaty* that would justify refusal to surrender Mr. Carroll to the United State.

[96] Thirdly, the *Sullivan* case upon which the majority relies is clearly distinguishable. Their expert evidence put the risk of civil commitment at 80%:

> [19] Nor is there any requirement that the person committed suffers from a medically-diagnosed mental illness or disorder. The Sexually Dangerous Persons Act merely requires dysfunction. All that is required is that the person manifests a "sexual…disorder or dysfunction" (see the definition of sexually dangerous person to which I have referred, above (Professor Janus at paragraph 23)). The assessment of risk of future sexually harmful behaviour is made by the Department of Corrections, the petitioning County Attorney and the committing court, using an actuarial instrument known as MnSOST-R. Professor Janus has applied that instrument and suggests that, on the current known information about the appellant, he would be placed on the high level of risk for future sexual offending [7]. He says he would score at least ten (paragraph 26) and asserts that those with scores of eight or higher are assigned the highest risk level [60] unless there are mitigating circumstances. He predicts that if prosecutors petition for his commitment the historical probability that Mr Sullivan would be committed is better than 80% (paragraph 61).

[97] Finally, unlike the majority, I am not concerned about Governor Dayton's letter which, in my respectful view, reflects a political posture as opposed to a legal analysis.

[98] In my view, the Minister's decision was reasonable and ought not be disturbed.

Conclusion

[99] I would dismiss the judicial review application.

MacDonald, C.J.N.S.