SUPREME COURT OF QUEENSLAND

CITATION:	*Butler v Attorney General (Qld)* [2018] QCA 243
PARTIES:	**JOSEPH WILLIAM BUTLER** (appellant) **v** **THE HONOURABLE YVETTE D'ATH, ATTORNEY GENERAL FOR THE STATE OF QUEENSLAND** (respondent)
FILE NO/S:	Appeal No 5960 of 2018 SC No 2772 of 2018
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – [2018] QSC 103
DELIVERED ON:	28 September 2018
DELIVERED AT:	Brisbane
HEARING DATE:	27 August 2018
JUDGES:	Sofronoff P and Morrison JA and Jackson J
ORDERS:	**1. The appeal be allowed.** **2. The orders made on 9 May 2018 be set aside.** **3. The order of the Governor in Council dated 1 February 2018 be set aside.** **4. The matter be remitted to the Governor in Council to be determined according to law.** **5. The respondent pay the appellant's costs of the appeal.**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – ERROR OF LAW – where the appellant was convicted of sexual offences involving children between 1962 and 1970 – where he has been indefinitely detained since 1982 under s 18 of the *Criminal Law Amendment Act* 1945 (Qld) – where he applied for release under s 18(5)(b) and the Governor in Council determined he should not be released – where a statutory order of review of that decision was dismissed – where on appeal it was contended that as a matter of statutory construction, the question to be answered under s 18(5)(b) was whether, on the evidence before the decision-maker, the appellant was capable of controlling his sexual instincts in a proper manner – whether the Governor in Council erred by not addressing the relevant

question

Criminal Law Amendment Act 1945 (Qld), s 18(5)(b)

Pollentine v Bleijie (2014) 253 CLR 629; [2014] HCA 30, followed
R v Kiltie (1986) 41 SASR 52, cited

COUNSEL: S Keim SC, with R W Haddrick and S T Lane, for the appellant
S A McLeod, and G Del Villar, for the respondent

SOLICITORS: Prisoners' Legal Service for the appellant
Crown Law for the respondent

[1] **THE COURT:** Mr Butler is currently detained at The Park Centre for Mental Health at Wacol.[1] He has been at that facility since 1982 as a result of being indefinitely detained under s 18 of the *Criminal Law Amendment Act* 1945 (Qld).[2]

[2] Mr Butler applied to be released from detention under s 18(5)(b) of the *CLAA*. On 1 February 2018 the Governor in Council decided that he not be released. Mr Butler sought a statutory order of review of that decision. It was dismissed by the learned primary judge,[3] and Mr Butler appeals from that decision.

General background

[3] How Mr Butler came to be indefinitely detained for the last 48 years is not in issue.

[4] Between 1962 and 1970 he was convicted of six sexual offences involving young males. The details of the events are no longer available, but they were described as "aggravated assault on a male child under the age of 14". None of them individually attracted a long sentence, but the consequence was that in June 1970 an order for indefinite detention was made under s 18(3) of the *CLAA*.

[5] Until 1982 Mr Butler was detained in the Security Patients' Hospital, and then from that time at The Park.

[6] Mr Butler has been the subject of a very high degree of supervision and control since his detention. In the last 48 years there is no evidence of inappropriate sexual behaviour, let alone offending. For a number of years during that time he has been permitted to have unsupervised access to the community, three days a week between the hours of 9 am and 2 pm. There is no evidence of any offending during that outside access.

[7] Not surprisingly Mr Butler is quite institutionalised. He is now about 80 years old and becoming increasingly infirm. He suffers from mild mental retardation but he does not suffer from any mental illness. He also suffers from a series of medical conditions, including: heart problems, including previous heart attacks; hypertension; type II diabetes; mild congestive cardiac failure; bladder cancer; extensive solar skin damage; osteoarthritis; cataracts; and declining kidney function. In addition he has to use bilateral hearing aids and because of recent falls he walks with a cane.

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1 We shall refer to this facility as "The Park".
2 We shall refer to this Act as the "*CLAA*".
3 *Butler v Attorney-General for the State of Queensland* [2018] QSC 103.

Relevant provisions of the *CLAA*

[8] The *CLAA* provides for the indefinite detention of offenders convicted of sexual offences. The relevant provisions are found in s 18, which provides that where a person has been found guilty of an offence of a sexual nature a judge may direct that two medical practitioners (of appropriate qualification) inquire into "the mental condition of the offender, and in particular whether the offender's mental condition is such that the offender is incapable of exercising proper control over the offender's sexual instincts": s 18(1)(a). If the medical practitioners report that the offender is so incapable, then the judge may direct that the offender "be detained in an institution during Her Majesty's pleasure": s 18(3).

[9] An offender so detained has to be examined by the chief psychiatrist, or a medical practitioner appointed by the chief psychiatrist, every three months, and that report goes to the chief psychiatrist: s 18(8) and (8A).

[10] Release is governed by s 18(5) which relevantly provides:

> "(5) Every offender or prisoner in respect of whom a direction is given under subsection (3) or (4) —
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> (a) shall be detained in such institution as the Governor in Council directs, … ; and
>
> (b) shall not be released until the Governor in Council is satisfied on the report of 2 medical practitioners that it is expedient to release the offender or prisoner."

[11] "Release" is defined to mean unconditional release, and not release under Part 3A of the *CLAA*, which deals with parole orders.

[12] As will appear the phrases "incapable of exercising proper control over the offender's sexual instincts" and "expedient to release the offender" assume some importance to the resolution of the issues on the appeal.

The application for release under s 18(5) of the *CLAA*

[13] There has been a somewhat prolonged history to Mr Butler's application for release under s 18(5)(b) of the *CLAA*. The process was initiated in September 2016, and reliance was placed on reports by Dr Aboud[4] and Dr Stedman[5]. That process culminated in the decision by the Governor in Council on 30 January 2017, that Mr Butler should not be released.

[14] Having received a request for a statement of the reasons for that decision, the Governor in Council advised that its decision would be rescinded and reconsidered, due to the fact that certain information was not included in the material put before it.

[15] Commencing in April 2017, new submissions were made in support of Mr Butler's release, and further medical reports were provided. Eventually, further submissions were made in support of the application in July 2017 and that was followed by the provision of even further medical reports. None of those additional reports were

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4 Dated 29 May 2015 and 2 August 2016: Appeal Book (**AB**) 60 and 59 respectively.

5 Dated 11 August 2016: AB 54.

reports commissioned under s 18(5)(b); some were the three-monthly reports required by s 18(8) and (8A).

[16] From October 2017 those representing Mr Butler sought to know the time frame for the decision by the Governor in Council. Eventually, in December 2017 advice was given that the application for release had not been progressed because of the intervening State election.

[17] Eventually, on 2 February 2018 advice was given that the Governor in Council refused Mr Butler's release. Then, on 28 February 2018 a statement of the reasons for the decision was produced.

The decision by the Governor in Council

[18] The Statement of Reasons[6] identified the two relevant sections of the *CLAA*, namely s 18(3) and s 18(5)(b). The relevant text of s 18(3) was set out, identifying the relevant question as whether the offender is incapable of exercising proper control over sexual instincts. The introductory part of the Statement of Reasons also recognised that release under s 18(5)(b) was unconditional release.

[19] The Statement of Reasons lists 13 separate facts as found on the evidence. They include No. 7:

> "Mr Butler has demonstrated a capacity to control his sexual impulses in the context of residing in an institutional environment, living according to communicated behavioural expectations and being prescribed anti-libidinal medication."

[20] Findings No. 10 and 11 were that there was no evidence that Mr Butler had sexually reoffended against a child or adult in his years of detention, but that Dr Aboud strongly suggested that he not be permitted to have unsupervised access to children.

[21] The reasons for the decision were expressed in six paragraphs. Given that it is now contended that the Governor in Council asked itself the wrong question or applied the wrong test, it is appropriate to set out the reasons in full:

> "The Governor in Council made the decision for the following reasons:
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> 1. Despite the conclusions of Dr Aboud and Dr Stedman that Mr Butler has demonstrated that he is capable of controlling his sexual instructs (sic) in the context of residing in an institutional environment, both doctors recognise that the release of Mr Butler into the community would require ongoing support and supervision (Stedman 11 August 2016, pp 4 and 5; Aboud 29 May 2015, p 3 and 2 August 2016 paras 1, 2 and 5).
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> 2. Dr Aboud, in his supplementary report states, at para 2, that 'I am unclear whether he would be capable of exercising proper control over sexual instincts should he find himself without a comparable level of support and supervision to that

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6 AB 154-157.

which currently exists for him at the Park Centre for Mental Health.'

3. Release by the Parole Board, under the provisions of part 3A of the CLAA, enables conditions to be applied, including additional conditions which may require the detainee to submit to medical, psychiatric or psychological treatment. There is no power for the Governor in Council to apply conditions to release of a detainee under s 18(5) of the CLAA (*Pollentine v Bleijie* (2014) 253 CLR 629, 648 [38]).

4. Release of Mr Butler under s 18(5) of the CLAA would not permit formal supervision and monitoring of Mr Butler in the community, and, in addition, there is no power after release under s 18(5) for the released person to be returned to detention if the release proves to be placing others at risk. Unlike release under part 3A, where a detainee could be returned to custody upon breach of a condition of release, the only way of returning the detainee to custody after release under s 18(5) would be by way of prosecution and conviction after a further offence.

5. While it is suggested that there are groups and individuals in the community willing to provide support to Mr Butler in the community if he is unconditionally released there is nothing compelling him to avail himself of those support measures.

6. PLS has submitted that the *Child Protection (Offender Reporting and Offender Prohibition Order) Act 2004* is sufficient to provide an effective supervisory regime if Mr Butler is released unconditionally into the community. However, the reporting requirements under this scheme do not provide the supervision and support, or conditions, appropriate for release of Mr Butler from detention."

Medical reports on the question of capability of control

[22] The reports available and relied upon by the Governor in Council included those of the two medical practitioners under s 18(5)(b) as well as some of the three-monthly reports.

The reports by the two medical practitioners under s 18(5)(b)

[23] Dr Stedman gave a report on 11 August 2016. Responding to the question "Is the person capable of exercising proper control over sexual instincts?", Dr Stedman said this:

> "Yes. Over the last 35 years of close observation, there have been no incidents of inappropriate sexual behaviour. Mr Butler has formed close relationships with other patients over the years but these have not developed into sexual relationships despite opportunity.
>
> He is a person who has a rigid adherence to rules. He has strongly internalised the rule that he needs to avoid contact with children to avoid accusations of improper behaviour. He avoids travelling at

> times that large numbers of children travel. He also strongly endorses the view that sexual contact with children is unacceptable.
>
> Currently he spends much of his time undertaking activities outside the hospital, there has been no suggestion of inappropriate behaviour of any sort."

[24] Dr Aboud provided two reports, the first dated 29 May 2015 and the second 2 August 2016. The second report had to be read in conjunction with the first. In the first, and responding to the same question as to capability of control, Dr Aboud said:

> "Recent and longitudinal evidence suggests that he is now likely capable of exercising proper control of sexual instincts. This was clearly not the case prior to his detention at the hospital in 1970. This has been achieved in the context of a boundaried institutional environment, clear instructions in respect of behavioural expectations and prescription of antilibidinal medication. It has also been achieved by significantly reducing potential access to children."

[25] In the second report, again responding to the same question as to capability of control, Dr Aboud said:

> "He has resided for many years in the protected environment of a psychiatric hospital, and has been provided with significant support and management of psychosocial stressors throughout this time. During this time he has not re-offended sexually. However, there has been concern that he has continued to harbour interest in children, as evidenced by his behaviour when previously an inpatient of the Extended Forensic Treatment & Rehabilitation Unit (as documented in my original report). I am unclear whether he would be capable of exercising proper control over sexual instincts should he find himself without a comparable level of support and supervision to that which currently exists for him at The Park Centre for Mental Health."

Three-monthly reports

[26] The Governor in Council had the benefit of an additional report by Dr Mann, given on 26 April 2017. That report identified the relevant question in a way which closely reflected what was said by Gageler J in *Pollentine v Bleijie*[7]:

> "Is the person capable of exercising proper control over sexual instincts? That is, is the person capable of exercising that degree of self-control which would prevent them from committing a further offence of a sexual nature?"[8]

[27] Dr Mann's answer to that question was in these terms:

> "Over the last few decades of close observation there have been no reported incidents of inappropriate sexual behaviour. Mr Butler has

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7 (2014) 253 CLR 629; [2014] HCA 30 at [59].

8 AB 89.

> in the past formed close relationships with other patients within the same facility which have not developed into sexual relationships. He has a long established tendency to adhere rigidly to rules. He avoids travelling at times when large numbers of children are travelling and endorses the view that sexual contact with children is unacceptable.
>
> Due to a decline in his physical health he is now spending a significantly reduced amount of time outside the hospital. He tends to remain in [the] inpatient unit much of the day and there are no suggestions of inappropriate behaviour in recent times."

[28] Dr Mann answered a related question, namely how Mr Butler's mental condition affected his ability to exercise control over his sexual instincts. His answer was: "Mr Butler has demonstrated over many decades that he is able to exert control over his sexual instincts in a structured and supported environment". There was also a subsequent report of Dr Mann, dated 2 August 2017, which answered those questions in the same terms. That opinion supports what was said by Dr Aboud and, properly understood, that of Dr Stedman.

[29] The report of Dr Mann on 26 April 2017 notes that Mr Butler had been taking anti-libidinal medication since 1999, but that ceased in January 2017. Dr Mann noted that there "has been no suggestion of any noticeable effects of this treatment or withdrawal of this treatment on his behaviour". That opinion indicates that there is no risk attached to the fact that anti-libidinal medication may not be available or administered once Mr Butler is released.

[30] In addition the Governor in Council also had the benefit of a short report from the Acting Executive Director and Director of Mental Health, Associate Professor John Allan. The report was given in October 2016, in support of the application for Mr Butler's release. Part of the report reads:

> "I regularly review reports provided by psychiatrists who have examined Mr Butler. Over many years psychiatrists have provided the opinion that Mr Butler is capable of exercising control over his sexual instincts. I agree with the opinions of Dr Steadman [sic] and Dr Aboud in this regard."

The appeal

[31] At the outset of the appeal Mr Keim SC, appearing with Mr Haddrick and Mr Lane for the appellant, was granted leave to amend the grounds of appeal. The effect was to abandon all the grounds advanced before the learned primary judge. Instead, the reformulated grounds raised three general heads, said to be errors of law by reason of: (i) the misconstruction of s 18(5)(b) of the *CLAA*; (ii) taking into account irrelevant considerations; and (iii) failing to take into account relevant considerations.

[32] The errors of law based on misconstruction by the decision-maker were by failing to recognise that:

(a) the question to be answered was whether, on the evidence before him, Mr Butler was capable of controlling his sexual instincts in a proper manner;

(b) Mr Butler was capable of controlling his sexual instincts in a proper manner unless it was well-nigh inevitable that, in the absence of coercive intervention by the State, he would re-offend;

(c) as a matter of statutory construction, Mr Butler was capable of controlling his sexual instincts in a proper manner if there were supports available to him in the community that, if he chose to avail himself of them, would allow him to control his sexual instincts in a proper manner;

(d) neither of the medical opinions relied upon by the decision-maker, namely, those of Drs Stedman and Aboud, was to the effect that Mr Butler was incapable of controlling his sexual instincts in a proper manner in the absence of coercive intervention by the State; and

(e) neither of the medical opinions relied upon by the decision-maker, namely, those of Drs Stedman and Aboud, was to the effect that re-offending by Mr Butler was well-nigh inevitable in the absence of coercive intervention by the State.

[33] The grounds relating to taking into account irrelevant considerations raised the following:

(a) that the Reports of Drs Stedman and Aboud recognise that the release of Mr Butler into the community would require ongoing support and supervision;

(b) that Dr Aboud, in his supplementary report dated 2 August 2016, states at [2] that he is "unclear whether he [Mr Butler] would be capable of exercising proper control over sexual instincts should he find himself without a comparable level of support and supervision to that which currently exists for him at The Park Centre for Mental Health";

(c) that there is no power of the decision-maker to apply conditions to release of a detainee under s 18(5) of the *CLAA* unlike in the case of release under Part 3A of the *CLAA*;

(d) that release of Mr Butler would not permit formal supervision and monitoring of him in the community;

(e) that there is no power under the *CLAA* for Mr Butler to be returned to detention if he proves to be placing others at risk; and

(f) that there is nothing compelling Mr Butler to avail himself of groups and individuals for support in the community.

[34] The grounds relating to the failure to take relevant considerations into account contended that the decision-maker failed to take into account "those matters of circumstantial evidence that supported the medical evidence to the effect that [Mr Butler] was capable of controlling his sexual instincts in a proper manner in the absence of coercive intervention by the State", namely:

(a) the extensive periods of time Mr Butler has been free in the community as a result of unrestricted leave;

(b) that Mr Butler has participated in the unsupervised leave program since the 1980s without any incident of inappropriate sexual behaviour;

(c) that previous compliance with community service or work programs (through leaves of absence from the prison) is relevant to the issue of Mr Butler's ability to control his sexual instincts in a proper manner; and

(d) that Mr Butler has spent so much time in the community unescorted without any incident.

[35] Section 18(1)(a) confers a discretion upon a judge who is sentencing an offender for certain offences to direct two or more named medical practitioners to inquire "as to the mental condition of the offender and, in particular, whether his mental condition is such that he is incapable of exercising proper control of his sexual instincts". The High Court considered the relevant provisions in *Pollentine v Bleijie*.[9] The expression "incapable of exercising proper control over … sexual instincts" is used to identify the question to be answered by the nominated medical practitioners and it identifies the content of the declaration a court must make if indeterminate detention is to be directed.[10] It is the statutory criterion which is critical to the operation of s 18.[11] There are dangers in asking whether the risk of reoffending is "acceptable" or "unacceptable" for that involves attempting to capture the whole of the operation of the statutory criterion by choosing different words.[12] It is the result of the statutory inquiry that can be described in terms of risk.[13]

[36] Section 18(5)(b) authorises release of such an offender if the Governor in Council is satisfied on the report of two medical practitioners that "it is expedient to release" the offender. In the context of the Act, those reports must be directed to whether, at the time of the report, the detainee remains a person whose mental condition is such that he is incapable of exercising proper control over his sexual instincts.[14] The report is the foundation for the decision whether it is "expedient" and so that matters with which the report should deal are confined to the question whether the detainee remains a person whose mental condition is such that he is incapable of exercising proper control over his sexual instincts.[15]

[37] It can be seen that the onus is on the Executive to establish the single ultimate fact upon which alone further indefinite detention can be justified, the detainee's incapacity in the statutory sense. This must be so, for only by proof of this extreme condition can such an extraordinary basis for incarceration be justified according to accepted social norms. It is important not to conflate considerations about predictions of future behaviour and notions of "unacceptable risk" with the statutory criterion, which remains the detainee's present incapacity.

[38] In *R v Kiltie*[16] King CJ said:

> "It is to be remembered, of course, that what is in question is not unwillingness to exercise self-control, nor a high degree of sexual drive, nor a high degree of temptation resulting from innate characteristics or external circumstances, nor special susceptibility to

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9 (2014) 253 CLR 629.
10 *ibid* at [23] per French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ.
11 *ibid*.
12 *ibid* at [25].
13 *ibid*.
14 *ibid* at [33].
15 *ibid* at [34].
16 (1986) 41 SASR 52 at 62.

> such temptation; what is in question is true incapacity to exercise the necessary degree of self-control over the sexual instincts.
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> …
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> The incapacity referred to in the section is an incapacity to exercise control resulting from innate mental characteristics. It is not that temporary incapacity to exercise self-control which results from the paralysis of will power caused by the ingestion of alcoholic liquor or drugs. Nor is it a strong inclination towards sexual offending resulting from deprivation of the means of satisfying sexual desire unless there is, in addition, an innate incapacity to control that inclination."

[39] A detainee in respect of whom the Governor in Council is not satisfied that it is expedient to release him may still apply for parole pursuant to s 18A of the Act. The test for release by way of parole prescribed by s 18F is a different one from that imposed by s 18(5)(b). It is whether, in addition to any other matter about which the Board must be satisfied under the *Corrective Services Act* 2006*,* the Board is satisfied that the detainee "does not present an unacceptable risk to the safety of others". Consideration of this criterion may take into account that the Board may impose conditions upon a prisoner pursuant to s 200 of the *Corrective Services Act* so as to reduce risk of harm to others. Section 18F of the Act empowers the Board to impose conditions relating to psychiatric and psychological treatment and drug testing. Section 18H provides that a detainee who takes advantage of the right to apply for parole may not apply for absolute release under s 18(5).

[40] It follows that even a detainee whom the Governor in Council would not release under s 18(5) may yet achieve release on parole subject to conditions. Such a person is one who is presumed to be incapable of properly controlling his sexual instincts but who, in the opinion of the Board, may be released into the community subject to appropriate conditions.

[41] In the present case, the question for the examining medical practitioners to consider and report upon, and the ultimate question of which the Governor in Council had to be satisfied was not whether there "was a risk" or whether a perceived risk was "unacceptable". It was whether the detainee lacked the statutory capacity.

[42] However, both Dr Stedman and Dr Aboud addressed the question whether the appellant represents an unacceptable risk to others.

[43] In his report dated 11 August 2016 Dr Stedman said:

> "Does the person represent an unacceptable risk to the safety of others?
>
> No. Mr Butler has demonstrated clearly over several decades that he has little interest in forming sexual relationships with either adults or children. He is adamantly opposed to sexual contact between adults and children and has a similar attitude to same sex sexual contact."

[44] In his report of 29 May 2015 Dr Aboud said:

> "Does this person represent an unacceptable risk to the safety of others?

> No. He presents a chronic low risk, which has proven manageable in the context of the boundaries, directions, monitoring and medication provided by a psychiatric institutional. He is now elderly and infirm. It is my view that his risk of sexual reoffending would also be manageable should he be progressed beyond the confines of the hospital. In such circumstances consideration should be given to the provision of supports, boundaries and guidance by informed staff, which would represent a continuation of the standard of care that he has been receiving in the hospital. This could occur within a nursing home or supported accommodation or a specially crafted alternate residential placement. While risk prediction must be considered an inexact science, particularly in a case such as Mr Butler's, it would seem a sensible minimum requirement for clinical involvement, which supports the arrangements that are currently working well, to continue regardless of his future residential circumstances. Such arrangements would rightly take into account monitoring and supervision of his access to children."

[45] The reasons of the Governor in Council discloses that the decision maker was concerned that the materials implied the existence of some level of risk and that, although that risk might be reduced by the provision of "support measures", there was no certainty that such measures would be utilised by the appellant. The reasons accurately state that Dr Aboud was "unclear" about the statutory criterion. The reasons inaccurately represent that Dr Stedman's opinion was that the appellant's demonstration of capacity was limited to "the context of residing in an institutional environment" and that his release "would require ongoing support and supervision". On the contrary, Dr Stedman observed that the appellant spent much time in the community without engaging in inappropriate behaviour.

[46] This appeal is not concerned with whether there have been errors of fact in arriving at the decision. The significance of the reports of the medical practitioners is that neither of them expressed the opinion that the appellant satisfied the statutory criterion that, alone, could justify his continued incarceration.

[47] Nor do the reasons of the Governor in Council show an appreciation of the task to be undertaken. Rather, the reasons explain why the decision maker apprehends that the appellant's release would be attended by risk. The reasons demonstrate a lack of satisfaction that the prospective "support measures" would necessarily be afforded to the appellant. But that is not the test.

[48] The reasons never address the only relevant question: Upon the basis of the expert opinions that have been offered, am I satisfied affirmatively that the appellant is presently incapable of properly controlling his sexual instincts?

[49] The decision was, therefore, made in excess of jurisdiction and is void.

[50] We order that:

1) The appeal be allowed;

2) The orders made on 9 May 2018 be set aside;

3) The order of the Governor in Council dated 1 February 2018 be set aside;

4) The matter be remitted to the Governor in Council to be determined according to law;

5) The respondent pay the appellant's costs of the appeal.