Federal Court  Cour fédérale

**Date: 20190415**

**Docket: T-206-19**

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[ENGLISH TRANSLATION REVISED BY THE AUTHOR]

**Ottawa, Ontario, April 15, 2019**

**PRESENT: Mr. Justice Grammond**

**BETWEEN:**

**JAMIE BOULACHANIS**

**Applicant**

**and**

**THE ATTORNEY GENERAL OF CANADA**

**Respondent**

## ORDER AND REASONS

[1] Ms. Boulachanis is an inmate at Donnacona Institution, a correctional institution for men. This surprising situation can be explained by the fact that Ms. Boulachanis only recently expressed her female gender identity. We now use the term “trans” to describe people who share her reality. The Correctional Service of Canada (the Service) refused her requests for transfer to a women’s institution. The Service considers Ms. Boulachanis to pose too great a risk, in

particular a risk of escape, to be placed in a women's institution. Ms. Boulachanis filed an application for judicial review of that refusal. That application has not yet been decided.

[2] Ms. Boulachanis began hormone therapy in January 2019. Since then, she has been more open about her female identity in the institution. A few days ago, the Service became aware of threats against Ms. Boulachanis's life and safety. To ensure her safety, she was placed in administrative segregation. She is now bringing a motion for an interlocutory injunction. She is asking the Court to order that her administrative segregation be ended and that she be transferred to a women's institution.

[3] I am allowing this motion in part. I find that the refusal to transfer Ms. Boulachanis to a women's institution constitutes *prima facie* discrimination based on gender identity or expression. The Attorney General did not discharge the burden of demonstrating that this discriminatory treatment was justified. Even though the Service will have to take special measures to manage the risk posed by Ms. Boulachanis, the evidence submitted does not convince me that this would result in undue hardship. On the contrary, being either exposed to threats or placed in administrative segregation constitutes irreparable harm for Ms. Boulachanis. That harm overcomes the inconvenience that could result from her transfer to a women's institution.

[4] In reading these reasons, one must keep in mind that an interlocutory injunction is an interim relief issued following a summary review of the issues, and on the basis of partial evidence. The injunction I am issuing today is not a definitive resolution to Ms. Boulachanis's

dispute with the Service. More importantly, these reasons are not intended to provide answers to all of the questions raised by the notion of adapting the correctional environment to the situation of trans individuals.

## I. Background

### A. *The rights of trans people, particularly in the correctional environment*

[5] Canadian society is becoming increasingly aware of the situation of trans people and of their rights. Before describing certain legislative initiatives relevant to this case, it may be helpful to quote certain definitions proposed by the Ontario Human Rights Commission:

> Sex is the anatomical classification of people as male, female or intersex, usually assigned at birth.
>
> Gender identity is each person's internal and individual experience of gender. It is a person's sense of being a woman, a man, both, neither, or anywhere along the gender spectrum. A person's gender identity may be the same as or different from their birth-assigned sex.
>
> Gender expression is how a person publicly expresses or presents their gender. This can include behaviour and outward appearance such as dress, hair, make-up, body language and voice. A person's chosen name and pronoun are also common ways of expressing gender. Others perceive a person's gender through these attributes.
>
> . . .
>
> Trans or transgender is an umbrella term referring to people with diverse gender identities and expressions that differ from stereotypical gender norms. It includes but is not limited to people who identify as transgender, trans woman (male-to-female MTF), trans man (female-to-male FTM), transsexual, cross-dressers, or gender non-conforming, gender variant or gender queer.
>
> (Ontario Human Rights Commission, *Policy on preventing discrimination because of gender identity and gender expression*, 2014, page 8 [OHRC, *Policy*])

[6] The social responses to the situation of trans people can roughly be divided into two categories: one approach that considers the trans reality to be an anomaly compared to the binary and "natural" categories of man and woman, and the other approach that recognizes that gender categories are socially constructed, acknowledges that gender expression falls on a spectrum and cannot be placed in binary categories and promotes individual autonomy in gender expression. On this topic, see Danièle Lochak, "Dualité de sexe et dualité de genre dans les normes juridiques" in Pierre Noreau and Louise Rolland, dir, *Mélanges Andrée Lajoie* (Montréal, Thémis, 2008), 659; Marie-France Bureau and Jean-Sébastien Sauvé, "Changement de la mention du sexe et état civil au Québec : critique d'une approche législative archaïque", (2011) 41 RDUS 1; Elaine Craig, *Troubling Sex: Towards a Legal Theory of Sexual Integrity* (Vancouver: UBC Press, 2012), chapter 1; Kyle Kirkup, "The Origins of Gender Identity and Gender Expression in Anglo-American Legal Discourse", (2018) 68 UTLJ 80.

[7] Thus, the situation of trans people was initially viewed from a medical standpoint. Transsexuality was considered a mental health disorder and was labelled as such in the DSM-III. In the DSM-V, the term "gender dysphoria" is used to describe the condition of a person whose gender identity does not correspond with their anatomical sex. The medical community developed "treatments" to address this discrepancy between gender identity and sex, particularly hormone therapy and sex reassignment surgery. However, not all trans people wish to undergo such treatments.

[8] Beginning in the 1970s, the provinces and territories changed their vital statistics legislation to legally recognize the change in sex of people who have undergone surgery, thus

reflecting the "medical" approach. In Quebec, the province where Ms. Boulachanis resides, article 71 of the *Civil Code of Québec*, which replaced provisions that had been in force since 1977, authorized the change of designation of sex and the given names of a person "who has successfully undergone medical treatments and surgical operations involving a structural modification of the sexual organs intended to change his secondary sexual characteristics." More recently, these laws were changed to recognize a change of sex without the requirement to have undergone surgery. For example, in 2015, the National Assembly amended article 71 of the *Civil Code of Québec*, which now stipulates that the change of designation of sex may "in no case be made dependent on the requirement to have undergone any medical treatment or surgical operation whatsoever." The Quebec legislature thus moved away from a purely medical approach and further recognized individual autonomy in gender expression.

[9] While the human rights legislation of the various provinces and territories has often been interpreted in a manner that affords a certain degree of protection to trans people (see, for example, *Commission des droits de la personne et des droits de la jeunesse v Maison des jeunes A…*, [1998] RJQ 2549 (TDP); *Sheridan v Sanctuary Investments Ltd.*, 1999 BCHRT 4 [*Sheridan*]), it has been considered desirable in recent years to add gender identity and expression explicitly to the prohibited grounds of discrimination listed in that legislation. The *Canadian Human Rights Act*, RSC 1985, c H-6 [the CHRA], which directly pertains to this case, was amended in this manner in 2017.

[10] The treatment of trans people in correctional institutions has been a matter of debate over the years. I can only provide an overview of the issue here. In *Kavanagh v Canada (Attorney*

*General)*, 2001 CanLII 8496 (CHRT) [*Kavanagh*], the Canadian Human Rights Tribunal concluded that the refusal to accommodate trans women inmates who had not undergone sex reassignment surgery in women's institutions constituted *prima facie* discrimination, but that this discrimination was justified given the particular characteristics of the correctional context.

[11] The Correctional Service of Canada (the Service) subsequently established a guideline on gender dysphoria, which was in effect until December 2017. That guideline stipulated that inmates "with gender dysphoria" could consult a psychiatrist, receive hormone therapy and, under certain conditions, undergo sex reassignment surgery. However, it provided that:

> Pre-operative male to female offenders with gender dysphoria will be held in men's institutions and pre-operative female to male offenders with gender dysphoria will be held in women's institutions.

[12] That guideline did not explicitly say how post-operative male-to-female inmates would be considered.

[13] In December 2017, soon after the coming into force of the amendments to the CHRA, the Service issued an Interim Policy Bulletin [the interim policy] repealing the guideline. This interim policy stipulates the following:

> CSC has a duty to accommodate based on gender identity or expression, regardless of the person's anatomy (i.e. sex) or the gender marker on identification documents. This includes placing offenders according to their gender identity in a men's or women's institution, Community Correctional Centre or Community-Based Residential Facility, if that is their preference, unless there are overriding health or safety concerns which cannot be resolved.

[14] This interim policy no longer mentions the concept of “gender dysphoria” and moves away from the medical view of transsexuality that pervaded the previous guideline.

B. *Ms. Boulachanis’s history*

[15] Ms. Boulachanis was born in the body of a man. Beginning in her twenties, she engaged in various criminal activities, including trafficking stolen cars and drugs. In 1997, she murdered one of her accomplices whom she believed was planning to turn her in to police and buried the body in a hidden location. During that time, she was arrested for various offences, including a matter of drug trafficking. In 1998, she fled Canada, thus evading justice. In 2001, the body of her accomplice was found, and a warrant was issued for her arrest for murder.

[16] From 1998 to 2011, Ms. Boulachanis lived under false identities in Greece, and subsequently in Ontario and the United States. She claims to have held various jobs, participated in U.S. army missions abroad and engaged in various fraudulent activities. We have little reliable information about that period in her life. In 2011, she was arrested in the United States and extradited to Canada.

[17] Upon her return to Canada, Ms. Boulachanis was charged with first-degree murder and detained in provincial custody. In 2013, she managed to escape while being transported in a prison van, but was caught soon after. After going through a metal detector, she handed over saw blades, handcuff keys and part of a screwdriver hidden in her body cavities. In 2015, a search of her cell turned up a variety of objects and instruments that could be used to escape, including

braided ropes, handmade handcuffs and tools. She was also convicted of obstructing justice for inducing witnesses to lie during her murder trial.

[18] Ms. Boulachanis was convicted of first-degree murder in December 2016. She received a life sentence, with no possibility of parole for 25 years. She was immediately transported to Donnacona Institution, a maximum-security penitentiary. She was later assigned a maximum-security classification.

[19] Once at Donnacona, Ms. Boulachanis broached the subject of her gender identity with the institution's psychologist. She also asked to see a psychiatrist to obtain a diagnosis of "gender dysphoria" that, if I understand correctly, would be necessary for continuing with the process. Ms. Boulachanis said that she wanted to receive hormone therapy and was planning to undergo sex reassignment surgery. In August 2018, a psychiatrist diagnosed her with "gender dysphoria." On October 26, 2018, Ms. Boulachanis had her first name and designation of sex changed in her act of birth, in accordance with article 71 of the *Civil Code of Québec*.

[20] Ms. Boulachanis submitted two requests for transfer to women's institutions, the first for Joliette Institution and the second for Grand Valley Institution. Those requests were denied because the institutions in question found that it would be difficult to manage the risk posed by Ms. Boulachanis.

[21] Donnacona Institution made sincere and considerable efforts to accommodate Ms. Boulachanis in terms of pronoun use, searches, showers and clothing. The affidavit of

Karl Léveillé, the Institution's Assistant Warden, Operations, largely confirms this. It was not always possible to come to an agreement with Ms. Boulachanis on these measures. These measures do not respond to her main request, which is to be transferred to a women's institution.

[22] Ms. Boulachanis began hormone therapy in January 2019.

[23] Since December 2018, Ms. Boulachanis has expressed concerns about her safety because of threats of "retaliation" from other inmates. Following an investigation, these concerns were initially deemed to be unfounded. However, on April 4, new information convinced the management of the Institution that Ms. Boulachanis's safety was at risk.

[24] Although the evidence does not disclose the precise nature of these threats or, more importantly, the motives of those who made them, Mr. Léveillé's affidavit alludes to recent changes in the other inmates' perception of Ms. Boulachanis.

## II. Legal framework

[25] In January 2019, Ms. Boulachanis filed an application for judicial review of the refusal of her request to be transferred to Joliette Institution. This application does not pertain to the subsequent decision to refuse her transfer to Grand Valley Institution, nor to the decision to place her in administrative segregation.

[26] A motion for interlocutory injunction brought within an application for judicial review can pertain only to the decision that is the subject of the application: *R v Canadian Broadcasting*

*Corp.*, 2018 SCC 5 at paragraphs 24-25, [2018] 1 SCR 196 [*CBC*]. Since the impugned decision is the denial of the transfer to Joliette Institution, the Attorney General argues that I cannot rule on the matter of administrative segregation, even in the context of an interlocutory injunction. The solution I offer to this difficulty is a practical one. As will be seen later, I order that Ms. Boulachanis be transferred to a women's institution. This will necessarily end her administrative segregation at Donnacona Institution. This matter therefore becomes moot, and I will not address it. Nevertheless, I will examine the matter of administrative segregation when I discuss the second component of the test in *CBC*, that is, irreparable harm.

[27] In *CBC*, the Supreme Court recently reiterated the tripartite test used to determine whether it is appropriate to issue an interlocutory injunction. For a mandatory injunction — an injunction that directs the defendant to do something, as opposed to an injunction that prohibits the defendant from doing something — the Court, in that same decision, stated that a more stringent requirement had to be applied at the first stage: a "strong *prima facie* case" (paragraph 15). This is because this type of injunction is often burdensome for the defendant and is often equivalent to the relief that would be requested at trial. Thus, the Court described the applicable test for mandatory injunctions as follows (at paragraph 18):

> (1) The applicant must demonstrate a strong *prima facie* case that it will succeed at trial. This entails showing a *strong likelihood* on the law and the evidence presented that, at trial, the applicant will ultimately be successful in proving the allegations set out in the originating notice;
>
> (2) The applicant must demonstrate that irreparable harm will result if the relief is not granted; and
>
> (3) The applicant must show that the balance of convenience favours granting the injunction.

[28] The application for interlocutory injunction was filed on April 9 and heard on April 11. I must note that the evidence submitted in support of Ms. Boulachanis was extremely fragmentary. Fulfilling his duty as an officer of the Court, the Attorney General provided abundant evidence in a very short time, which enabled me to understand the main elements of the factual background. Nevertheless, the fact remains that much more extensive evidence will be adduced in the context of the application for judicial review and that it will be possible to cross-examine the persons who swore affidavits.

## III. Analysis

[29] I will therefore analyze Ms. Boulachanis's motion according to the three criteria set out in *CBC*, i.e. a strong *prima facie* case, irreparable harm and the balance of convenience.

### A. *A strong prima facie case*

[30] To determine whether Ms. Boulachanis presented a strong *prima facie* case, it can be helpful to begin by reviewing the positions of the parties. Ms. Boulachanis's position is straightforward: keeping her in a men's institution is discriminatory, and in addition, this violates the interim policy. Since she is legally a woman, she has the strict right to be accommodated in a women's institution.

[31] On the contrary, the Attorney General's argument is based on the exception that appears in the interim policy. He argues that Ms. Boulachanis's case, because of her high risk of escape, raises "overriding health or safety concerns which cannot be resolved." The decision to keep

Ms. Boulachanis in a men's institution would be the result of weighing her right to equality against the objectives of the *Corrections and Conditional Release Act*, SC 1992, c 20 [the CCRA], namely those regarding public safety. Citing the decision in *Doré v Barreau du Québec*, 2012 SCC 12, [2012] 1 SCR 395 [*Doré*], the Attorney General argues that the outcome of this weighing exercise was reasonable.

[32] Given that Ms. Boulachanis refers to the CHRA and not the *Canadian Charter of Rights and Freedoms*, the *Doré* analytical framework does not apply. Instead, we must turn to the framework for analyzing claims made under the CHRA or provincial and territorial human rights legislation (in a correctional context, see *Drennan v Canada (Attorney General)*, 2008 FC 10). In *Moore v British Columbia (Education)*, 2012 SCC 61 at paragraph 33, [2012] 3 SCR 360 [*Moore*], Justice Rosalie Abella of the Supreme Court of Canada summarized this analytical framework as follows:

> . . . to demonstrate *prima facie* discrimination, complainants are required to show that they have a characteristic protected from discrimination under [the CHRA]; that they experienced an adverse impact with respect to the service; and that the protected characteristic was a factor in the adverse impact. Once a *prima facie* case has been established, the burden shifts to the respondent to justify the conduct or practice, within the framework of the exemptions available under human rights statutes. If it cannot be justified, discrimination will be found to occur.

[33] Our Court typically exercises restraint when reviewing decisions made by the Service. In particular, the Service has considerable expertise in assessing the risk and selecting the appropriate institution for an inmate. However, the decision at issue here is of a fundamentally different nature. Stripped to its essentials, the issue is to determine whether Ms. Boulachanis should be treated as a man or as a woman. That is a fundamental question that falls to be

answered based on the provisions of human rights legislation and the roots of the principle of substantive equality. On those issues, the Service does not have expertise greater than that of our Court. They do not call for the same level of deference.

(1) *Prima facie* discrimination

[34] Ms. Boulachanis must first demonstrate that she is experiencing *prima facie* discrimination.

[35] In our society, certain facilities or areas are often reserved for men or for women. Reconciling these deeply entrenched practices with the right to equality of trans people often raises challenges. Nevertheless, there is *prima facie* discrimination when a trans person is forced to use facilities reserved for people of their anatomical sex, when they do not correspond to their gender identity or expression: see, for example, *Sheridan* and *Kavanagh*. Such an approach is consistent with a perspective based on individual autonomy in gender identity and expression.

[36] Thus, Ms. Boulachanis was subject to *prima facie* discrimination because of her gender identity or expression, given that she was denied a transfer to a women's institution, even though that is what corresponds to her current gender identity and expression and the designation of sex that now appears on her act of birth. That was also the conclusion of the Canadian Human Rights Tribunal in *Kavanagh*, at paragraph 141. The interim policy the Service adopted in December 2017 was also based on the idea that respecting the right to equality of trans people required that their choice to be in a men or women's institution be respected.

[37] Ms. Boulachanis was also subject to *prima facie* discrimination from another perspective. While all inmates undergo a risk assessment to determine their security classification, it is only in the case of trans women inmates that the Service use this assessment to deny them the possibility of being accommodated in a women's institution. A cisgender woman who presented just as great a risk as Ms. Boulachanis would automatically be sent to a women's institution. That is another reason for a finding of *prima facie* discrimination.

(2) The justification for the discrimination

[38] Paragraph 15(1)(g) of the CHRA stipulates that distinction is not a discriminatory practice when it is supported by a "*bona fide* justification". Subsection 15(2) specifies that such justification exists when remedying the discrimination would impose "undue hardship". As the Supreme Court reiterated in the excerpt of *Moore* cited above, the burden of proof regarding this question is on the Attorney General, who is attempting to show that the discrimination is justified.

[39] Furthermore, human rights legislation sometimes contains exceptions for certain categories of organizations. See, for example, *Vancouver Rape Relief Society v Nixon*, 2005 BCCA 601. No exception of this kind was raised in this case.

[40] In this case, the Attorney General is not claiming that the simple presence of trans women in women's institutions would cause undue hardship. It appears that the adoption of the interim policy, which clearly provides for this presence, implicitly set aside the arguments that, more

than fifteen years ago, led to the Canadian Human Rights Tribunal's finding in *Kavanagh*, at paragraphs 155–160.

[41] What the Attorney General is arguing is that accommodating trans women inmates in a women's institution must be subject to an assessment of the level of risk to health and safety. To justify this condition that would be applied only to trans women inmates, the Attorney General strongly insists on the fact that men and women's institutions do not meet the same security requirements. In particular, the evidence clearly shows that the construction standards are different and that the use of firearms to ensure safety is prohibited in all women's institutions, whereas it is allowed in men's institutions, depending on their security level. These differences in the design and operation of the two categories of institution apparently reflect the fact that men are, in general, more dangerous than women, that the criminal behaviour of men and women is different, and that women may benefit from a different correctional approach based on their specific needs. In this regard, the policy adopted by the Service is largely inspired by the report of Justice Louise Arbour concerning the riot that occurred at the Kingston women's prison in 1994 (*Commission of Inquiry into Certain Events at the Prison for Women in Kingston*, Minister of Public Works and Government Services Canada, 1996).

[42] I have no difficulty accepting the fact that it is appropriate to separate men and women in a correctional environment and that it is appropriate to implement less strict security measures in response to the different situation of women. But that is not the issue. The real issue is to determine whether, in a context where it is justified to keep separate institutions for men and women, Ms. Boulachanis should be treated as a man or as a woman.

[43] In this regard, the Attorney General's arguments are based in a questionable form of biological determinism.

[44] Thus, at the hearing, the Attorney General argued that the greater physical capabilities of a trans woman inmate like Ms. Boulachanis would increase the escape risk. The escape risk would be a relevant factor in assessing the "potential for violent behaviour," a factor that must be taken into account in determining an inmate's security classification according to section 17 of the *Corrections and Conditional Release Regulations*, SOR/92-620. In written submissions made at my request after the hearing, the Attorney General states the following:

> [TRANSLATION] Considering the infrastructure of women's institutions, the escape risk of a person with male anatomy, even though she identifies as a woman and is transitioning to become a woman, can be different simply by virtue of her physical capabilities and muscular strength associated with her male chromosomes.

[45] I find it hard to believe that physical capability is so important in assessing the risk posed by an inmate that, for that reason alone, trans women inmates must be treated as men. Furthermore, I note that the assessment to determine Ms. Boulachanis's security classification makes no mention of her physical capabilities.

[46] Ultimately, the Attorney General's argument is based on the idea that a man will always be a man, despite a change in gender identity or expression and despite the philosophy behind the amendments made to the CHRA in 2017. In other words, according to the Attorney General, we should not consider trans women inmates as women because the risk they actually present is that which is associated with their biological sex. In his written reply to my question, the

Attorney General stated that even a person who has completed the sex reassignment process prior to becoming an inmate, including surgery, should be assessed before being placed in a women's institution. In short, for the Service, chromosomes take precedence over gender identity or expression.

[47] In the context of this motion for interlocutory injunction, no evidence has been filed to support such generalizations. It is true that, in some circumstances, decisions may be based on statistical studies that differentiate men and women – one can think of insurance. As I mentioned above, keeping separate correctional institutions for men and women is justified by such differentiation. In *Ewert v Canada*, 2018 SCC 30, [2018] 2 SCR 165, the Supreme Court warned against the use of statistical assessment tools that have not been designed for the specific situation of a minority group. That is the case here: statistics compiled according to the binary categories of "man" and "woman" do not tell us much about the dangerousness or predisposition to criminal behaviour of trans people specifically because they cannot automatically be treated as either gender.

[48] In the absence of a reliable scientific basis, we are reduced to speculation, which is fertile ground for discriminatory prejudice. At the hearing, the Attorney General made certain hypotheses about the physical and psychological effects of the various phases of the sex reassignment process on risk and dangerousness. I have serious doubts about the validity of such hypotheses. Moreover, we should also consider the social effects of this process, in particular on the ability to maintain relationships with potential accomplices or criminal networks.

[49] I will simply say that in the absence of more specific information, the Attorney General failed to demonstrate that the hypotheses about the risk presented by trans women inmates justifies the *prima facie* discrimination against Ms. Boulachanis, thus preventing her from showing a "strong *prima facie* case".

[50] More specifically, the Attorney General is asking me to consider the specific case of Ms. Boulachanis. At the hearing, he said that she had the [TRANSLATION] "criminal behaviour of a man" and that, among some 700 women inmates in the country's federal institutions, none is as dangerous. In her affidavit, the Assistant Deputy Commissioner, Correctional Operations, for the Quebec region, Ms. Cynthia Racicot, states:

> [TRANSLATION] Currently, only a limited number of female inmates incarcerated in secure units present a high risk on the three criteria: escape risk, public safety risk and institutional adjustment. However, none of them requires such a high level of supervision in the institution and a high-risk escort when travelling outside the institution, as the applicant requires.

[51] I do not doubt that Ms. Boulachanis presents a considerable risk, especially in terms of the potential for escape. Nevertheless, her counsel noted that Ms. Boulachanis had not been placed in a special handing unit or been declared a dangerous offender, which puts into perspective the statements about the extreme risk she presents.

[52] The question is to determine whether the management of this risk would impose undue hardship. There is no question that if Ms. Boulachanis is transferred to a women's institution, the Service will have to take special measures to manage the risk she presents. However, the evidence presented does not convince me that these measures would cause excessive hardship or

impose exorbitant costs. I have clearly noted that Joliette and Grand Valley institutions do not wish to accommodate Ms. Boulachanis because of safety concerns. It seems that the main practical concern is the scope of the escort measures that are required when Ms. Boulachanis is transported outside of the institution, such as for medical reasons. However, no evidence has been provided as to the frequency of Ms. Boulachanis's outings. Moreover, it has not been explained why it would be impossible when an outing is required, to mobilize local police or Service staff from another institution to ensure a sufficient level of security.

[53] Thus, the Attorney General, who bears the burden of proof on this matter, has not convinced me that transferring Ms. Boulachanis to a women's institution would impose undue hardship. Consequently, I conclude that Ms. Boulachanis has shown a "strong *prima facie* case".

(3) Procedural obstacles

[54] The Attorney General has also made procedural arguments to counter Ms. Boulachanis's "strong *prima facie* case".

[55] Firstly, the Attorney General argues that Ms. Boulachanis has not exhausted her internal recourse, that is, the grievance or complaint procedure set out in sections 90 to 91.2 of the CCRA. In fact, Ms. Boulachanis filed a grievance regarding the refusal to transfer her to Joliette Institution, and no final decision has been made.

[56] In this regard, the discretionary nature of judicial review is well established. Thus, even where an applicant is able to show the legal basis of the remedy they are seeking, the court may

refuse to order relief. One of the commonly accepted reasons for refusing to order relief is the existence of adequate alternative recourse: *Harelkin v University of Regina*, [1979] 2 SCR 561; *Strickland v Canada (Attorney General)*, 2015 SCC 37, [2015] 2 SCR 713 [*Strickland*]. To determine the appropriate way to exercise this discretion, it is necessary to assess the advantages and disadvantages of judicial review and the alternative remedy, considering a vast range of factors, including "the convenience of the alternative remedy; the nature of the error alleged; the nature of the other forum which could deal with the issue, including its remedial capacity; the existence of adequate and effective recourse in the forum in which litigation is already taking place; expeditiousness; the relative expertise of the alternative decision-maker; economical use of judicial resources; and costs" (*Strickland*, at paragraph 42).

[57] Our Court may, in exercising its discretion, refuse to hear an application for judicial review of a decision in the correctional domain when the grievance procedure has not yet reached its conclusion: *Mackinnon v Warden of Bowden Institution*, 2016 FCA 14. However, this case is urgent, and it is far from certain whether the grievance procedure can be finalized quickly. Our Court is able to issue relief quickly at the interlocutory stage, whereas the grievance procedure does not seem to offer that possibility. In addition, the case raises questions as to not only the application of the CCRA, but also and especially human rights, which are not directly within the Service's expertise. Considering all of these factors, I exercise my discretion in favour of hearing the case.

[58] Secondly, the Attorney General argues that the refusal to transfer Ms. Boulachanis was consistent with the interim policy, which explicitly states that a transfer can be denied because

the risk is too high. Since Ms. Boulachanis does not dispute the validity of that policy, her motion should fail. However, the policy is not a statute or a regulation adopted under legislation. Ms. Boulachanis did not have to challenge its validity explicitly, or file a notice of constitutional question, if that is what the Attorney General has in mind. A defendant cannot counter an allegation of discrimination by stating that the discrimination is the result of a policy it adopted itself.

B. *Irreparable harm*

[59] Ms. Boulachanis must also demonstrate that she would suffer irreparable harm if I do not grant the injunction she is seeking. The harm she is describing relates to her personal safety. There are two sources of this harm: the threats she is receiving from other inmates, and her placement in administrative segregation.

[60] The first source of harm is simple to understand and requires no detailed explanation. Suffice it to say that the decision to place Ms. Boulachanis in administrative segregation to ensure her safety attests to the seriousness of the threats.

[61] However, the Attorney General argues that this threat is particular to Donnacona Institution. A transfer to Port-Cartier Institution, another men's institution, is apparently being considered to resolve the issue. The fact remains that the threat Ms. Boulachanis is facing, from what one can reasonably infer, is the result of prejudices against trans people that would largely be widespread in the male prison population (OHRC, *Policy*, page 55). It can be assumed that a similar threat would rapidly emerge in another men's institution given the process

Ms. Boulachanis is undergoing. The evidence does not demonstrate precisely how trans women inmates are seen in women's institutions, but the Attorney General stated that a certain number of trans women inmates are currently incarcerated in women's institutions and did not mention any serious difficulties resulting from the situation.

[62] The second source of harm is administrative segregation itself. In *Winters v Legal Services Society*, [1999] 3 SCR 160, Justice Cory of the Supreme Court of Canada described administrative segregation (then called solitary confinement) as follows (at paragraph 67):

> It is clear that solitary confinement is not simply a different yet similar form of incarceration than that experienced by the general prison population. Its effects can be serious, debilitating and possibly permanent. They serve to both emphasize and support the conclusion that solitary confinement constitutes an additional and a severe restriction on a prisoner's liberty.

[63] The constitutional validity of the provisions of the CCRA on administrative segregation was recently challenged. Furthermore, a bill to reform these provisions is currently before Parliament. On March 28, 2019, the Ontario Court of Appeal issued its decision in *Canadian Civil Liberties Association v Canada*, 2019 ONCA 243. The Court concluded, among other things, that administrative segregation is a cruel and unusual punishment if it exceeds 15 days. The Court based that conclusion on the trial judge's findings of fact regarding the effects of administrative segregation. The Court summarized these effects as follows, at paragraph 73:

> The application judge made findings that administrative segregation:
>
> - amounts to a significant deprivation of liberty – it places the inmate in a prison located within the prison;
> - imposes a psychological stress capable of producing serious permanent observable negative mental health effects;

- is harmful;
- causes sensory deprivation and has harmful effects as early as 48 hours after admission;
- can alter brain activity and result in symptoms within seven days; and
- poses a serious risk of negative psychological effects when prolonged and is offside responsible medical opinion.

[64] The Attorney General filed an application for leave to appeal to the Supreme Court and obtained an "interim interim" suspension of the Court of Appeal decision (see also *British Columbia Civil Liberties Association v Canada (Attorney General),* 2019 BCCA 5 regarding similar proceedings in British Columbia). Nevertheless, I can base my decision on the findings of fact cited above, given the restraint the Supreme Court typically shows toward this type of finding, particularly when they were confirmed by a court of appeal.

[65] The Attorney General also states that Ms. Boulachanis's segregation since April 4 complies with the current CCRA provisions and that its duration has not yet exceeded 15 days. While I do not doubt the Service's desire to find a solution quickly, what is currently being considered is a transfer to another men's institution. As I mentioned above, there is every indication that the situation is very likely to recur or continue.

[66] In short, it is undeniable that administrative segregation has considerable and rapid negative psychological effects. I am of the view that keeping Ms. Boulachanis in administrative segregation is a form of irreparable harm that can support an application for an interlocutory injunction, provided, of course, that the other criteria are met.

[67] In short, whether she is placed in administrative segregation or remains in the general population at a men's institution, Ms. Boulachanis is exposed to irreparable harm.

C. *Balance of convenience*

[68] The third stage of the test in *CBC* requires that we compare the inconvenience experienced by Ms. Boulachanis in the event the injunction is denied (which corresponds to the irreparable harm component) with the inconvenience for the Service if the injunction is granted.

[69] In this regard, the Attorney General reiterates his arguments regarding the need to ensure public and inmate safety and the security of the institution. He also cites excerpts of *RJR−Macdonald Inc. v Canada (Attorney General)*, [1994] 1 SCR 311 [*RJR*], where the Court states that the balance of convenience often tips in favour of the State.

[70] On that point, I note that the Supreme Court's comments related to a situation where a party was in effect requesting the suspension of a regulation *erga omnes* while awaiting a final decision on its constitutional validity. The regulation in question would have been entirely inoperative for the duration of the suspension. In this case, only Ms. Boulachanis's situation is at stake. Her situation is similar to motions for stay of removal of a person from Canada, which are often brought before our Court, in that the State's general interest in enforcing the law must often yield when, in an individual case, the applicant has presented a strong *prima facie* case, and demonstrated irreparable harm (see, for example, *Mauricette v Canada (Public Safety and Emergency Preparedness)*, 2008 FC 420 at paragraph 48).

[71] Obviously, I am sensitive to the security concerns that are at the heart of the CCRA (see section 3.1 of that Act). However, as mentioned above, the measures the Service will have to take to manage the risk presented by Ms. Boulachanis do not constitute undue hardship.

[72] Lastly, the transfer to a women's institution will not result in the suspension of the life sentence imposed on Ms. Boulachanis and does not have the effect of freeing her.

[73] In short, even though Ms. Boulachanis's transfer to a women's institution will cause inconvenience for the Service, I am of the opinion that this inconvenience is not sufficient to outweigh the harm that Ms. Boulachanis is suffering as a result of her current situation.

## IV. Conclusion

[74] Because the three criteria of the test in *CBC* have been satisfied, the motion for interlocutory injunction is granted.

[75] As previously mentioned, this motion can only pertain to the refusal to transfer Ms. Boulachanis to a women's institution. As a result, I will not grant any relief with respect to administrative segregation. Therefore, the motion is allowed only in part.

[76] By allowing the motion, I do not intend to limit the Service's discretion in determining the most appropriate women's institution to receive Ms. Boulachanis. As previously mentioned, our Court gives the Service great latitude in this area. The Service may have no choice but to impose considerable restrictions on Ms. Boulachanis in order to manage the risk she presents.

Ms. Boulachanis's living conditions after her transfer to a women's institution are beyond the scope of this motion.

**ORDER in T-206-19**

**THIS COURT ORDERS that:**

1. The Correctional Service of Canada transfer Ms. Boulachanis to a women's institution;

2. With costs in favour of the applicant.

"Sébastien Grammond"
Judge

**FEDERAL COURT**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

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|---|---|
| **DOCKET:** | T-206-19 |
| **STYLE OF CAUSE:** | JAMIE BOULACHANIS v THE ATTORNEY GENERAL OF CANADA |
| **PLACE OF HEARING:** | OTTAWA, ONTARIO |
| **DATE OF HEARING:** | APRIL 11, 2019 |
| **ORDER AND REASONS:** | GRAMMOND J. |
| **DATED:** | APRIL 15, 2019 |

**APPEARANCES:**

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