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Boulachanis v Canada: Transgender Inmate Moved to Women's Prison

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Case Commented On: *Boulachanis v Canada (Attorney General)*, 2019 FC 456 (CanLII)

In *Boulachanis v Canada*, Justice Sébastien Grammond of the Federal Court granted Jamie Boulachanis' application for an interlocutory injunction ordering that she be transferred to a women's prison. Ms. Boulachanis, who is a transgender woman, initially made a transfer request to Correctional Service Canada (CSC) and was denied. She applied for judicial review of the decision denying the transfer. While waiting for resolution of her judicial review application, she was moved to administrative segregation due to threats to her safety from other (male) inmates. Accordingly, she successfully applied for an interlocutory injunction and an order that she be moved to a women's prison immediately.

Justice Grammond's decision discusses Ms. Boulachanis' history, the rights of transgender people in a correctional environment, and the tripartite test for an interlocutory injunction. He found, "the refusal to transfer Ms. Boulachanis to a women's institution constitutes prima facie discrimination based on gender identity or expression" (at para 3). Justice Grammond's decision is an important victory for the rights of transgender inmates, who face unique roadblocks and safety risks and who must contend with persistent myths and misinformation about their gender identities and expressions.

Facts

Ms. Boulachanis began her life sentence for first degree murder in December 2016 at Donnacona Institution, a maximum-security prison in Quebec (at para 18). In August 2018, a psychiatrist diagnosed her with gender dysphoria. In October 2018, Ms. Boulachanis had her first name and designation of sex changed in her act of birth (at para 19). In January 2019, she began hormone therapy (at para 22). She twice applied for transfers to women's prisons and was refused both times on the grounds that those prisons would find it difficult to manage the risk Ms. Boulachanis posed (at para 20). Donnacona Institution made "sincere and considerable efforts" to accommodate Ms. Boulachanis' needs as a transgender person, but in April 2019 it became clear to prison management that "recent changes in the other inmates' perception of Ms. Boulachanis" now presented a threat to her safety (at paras 21, 23, 24). The decision does not give much detail beyond a general reference to safety risks from other inmates, though Justice Grammond commented, "much more extensive evidence will be adduced in the context of the application for judicial review" (at para 28).

Analysis

Justice Grammond described the main issue as follows: "Ms. Boulachanis's position is straightforward: keeping her in a men's institution is discriminatory . . . . Since she is legally a woman, she has the strict right to be accommodated in a women's institution" (at para 30). He discussed her discrimination claim primarily under the first branch of the tripartite test for an interlocutory injunction, a strong *prima facie* case for trial. CSC's opposition to her claim was based on an argument that the greater physical capabilities of a transgender woman like Ms. Boulachanis would increase her escape risk in ways that could not be managed at a women's prison (at para 44). CSC uses different security measures in women's prisons based on evidence that "women may benefit from a different correctional approach based on their specific needs." For example, CSC employees are not permitted to use firearms in women's prisons (at para 41).

Justice Grammond had no difficulty with the appropriateness of separating men and women in a correctional environment or implementing less strict security measures for female inmates (at para 42). However, he characterized CSC's stance as being discriminatory because it was "based on the idea that a man will always be a man, despite a change in gender identity or expression" (at para 46). He also expressed skepticism about the idea 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" (at para 45). As he rightly pointed out, if Ms. Boulachanis was a cisgender woman who presented an equally great security risk, she would automatically be placed in a women's institution (at para 37). In addition, 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" (at para 51).

Justice Grammond summarized CSC's stance as follows:

> . . . 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 [CSC], chromosomes take precedence over gender identity or expression. (at para 46)

He also noted the possible risks of using statistical risk assessment tools designed for "the binary categories of 'man' and 'woman'" to predict "the dangerousness or predisposition to criminal behaviour of trans people" (at para 47). Justice Grammond cited the Supreme Court of Canada's decision in in *Ewert v Canada*, 2018 SCC 30 on this point, a decision which dealt with risk assessment for Indigenous offenders (I commented on *Ewert* here and here). As in *Ewert*, it is discriminatory to use risk assessment tools that were not designed with a particular minority group in mind (such as Indigenous people or trans people) to assess the behavior of that group's members. As Justice Grammond warned, "In the absence of a reliable scientific basis, we are reduced to speculation, which is fertile ground for discriminatory prejudice" (at para 48).

Having concluded that Ms. Boulachanis had a *strong prima* facie case for trial, that the discrimination was not justified, and that it was appropriate to exercise judicial discretion to hear her application for an injunction, Justice Grammond moved to the second and third parts of the tripartite test. He held that Ms. Boulachanis would suffer irreparable harm if the injunction was not granted: either harm from male members of the general prison population or harm resulting from prolonged time in administrative segregation necessary to avoid contact with members of the general prison population (at paras 59-67). He also held that the balance of convenience favoured Ms. Boulachanis because "the measures the Service will have to take to manage the risk presented by Ms. Boulachanis [in a women's institution] do not constitute undue hardship" (at para 71).

Justice Grammond granted Ms. Boulachanis' application for an interlocutory injunction pending the resolution of her judicial review of CSC's refusal to transfer her to a women's prison. While that decision will provide a final resolution, Justice Grammond's decision in the interim sets an important precedent that CSC is required to respect inmates' gender identities regardless of their pre-operative or post-operative status.

Conclusion

Transgender inmates are uniquely vulnerable to abuse and harm in a prison context, and CSC has been slow to modify its policies to protect them and recognize their rights. Until December 2017, CSC's policy on transgender inmates was: "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" (at para 11). The policy now provides that transgender people should be held in an institution that matches their gender identity, absent "overriding health or safety concerns" (at para 13), an improvement in theory but perhaps less so in practice. CSC's insistence on arguing that Ms. Boulachanis' chromosomes determine her security risk indicates that CSC has not entirely abandoned an approach to transgender inmates that focuses primarily and problematically on biological sex.

Indeed, as exemplified in *Boulachanis*, CSC continues to make unreasonable distinctions between pre- and post-operative transgender people, implying that an individual's genitalia determines their identity. Aside from the often prohibitive cost of gender reassignment surgery, many transgender people do not wish to surgically alter any of their body parts (see para 7). The right to gender expression recognized in the *Canadian Human Rights Act*, RSC 1985, c H-6 (and provincial and territorial human rights statutes) protects their ability to choose how to express their chosen gender, and that includes choices to pursue or not pursue surgery. As Justice Grammond recognized, "Medical treatments and surgical operations involving a structural modification of the sexual organs" are no longer required to change sex designation and given names on identification documents (at para 8). Similarly, biological sex should no longer be a determinative factor governing placement for transgender inmates.

In addition, to the extent that CSC's policies differ between men's and women's institutions, transgender women inmates should receive the same benefits of female-specific policies as do cisgender women inmates. At the same time, Justice Grammond's reliance on the SCC's decision in *Ewert* indicates that CSC should not rigidly apply policy designed with either cisgender men or women in mind when assessing the needs of transgender inmates. In much the same way as risk

assessment tests developed without Indigenous offenders in mind should not be uncritically applied to Indigenous offenders, correctional policies developed without transgender inmates in mind should not be uncritically applied to them. The *Boulachanis* decision indicates that despite policy changes and "sincere efforts" at CSC, biological sex still plays far too great a role in decision-making about transgender inmates. They deserve better.

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