

The 2024 OJEN Charter Challenge

Andy Lemoine

v.

Canada (Minister of Public Safety and
Emergency Preparedness)



This OJEN Charter Challenge Case Scenario has been adapted from the Official Problem used at the Wilson Moot. The Wilson Moot was conceived to honour the outstanding contribution to Canadian law made by the late Honourable Justice Bertha Wilson and, in the spirit of this contribution, to promote justice for those disempowered within the legal system. The goal of The Wilson Moot is to explore legal issues concerning women and minorities, and thereby promote the education of students and the legal profession in these areas of pressing concern. OJEN would like to thank the organizers of the Wilson Moot, Blake, Cassels and Graydon, LLP, for letting it adapt this law school resource for a high school audience.

Fact scenario

Andy Lemoine (pronouns: he/they) is an inmate at the Victoria Beach Institution in Victoria Beach, Ontario, a medium-security prison for female-identified inmates run by the federal Correctional Service of Canada (the “CSC”). In June 2022, Andy applied for a transfer to the nearby East Hawk Institution, a prison with medium and maximum-security facilities for male-identified inmates, also run by the CSC. Andy’s application for a transfer was denied by the Regional Deputy Commissioner in a written decision (the “Decision”). In August 2022, Andy brought an application for judicial review of the Decision, on the grounds that the Decision infringed his rights to life, liberty, security of the person, and equality under sections 7 and 15 of the Canadian Charter of Rights and Freedoms (the “Charter”).

The Decision was made pursuant to Commissioner’s Directive 85 – Accommodation and Transfer of Gender Diverse Inmates (the “Directive”). In making the Decision, the Regional Deputy Commissioner was exercising authority delegated by the Corrections and Conditional Release Act, SC 1992, c 20.1. The relevant portions of the Directive are set out in Schedule “A” to the Problem.

Andy brought his judicial review application to the Superior Court of Ontario, seeking:

- (a) a declaration that the Decision infringed his rights to life, liberty and security of the person under section 7 of the Charter;
- (b) a declaration that the Decision infringed his equality rights under section 15 of the Charter;
- (c) a declaration that the infringements of section 7 and 15 of the Charter do not represent reasonable limitations on these rights; and
- (d) orders under section 24(1) of the Charter setting aside the Decision, directing Andy’s transfer to East Hawk Institution, and awarding damages to vindicate his Charter rights.

Notes for the Challenge:

1. For the purposes of the Charter Challenge, participants are to assume that the Regional Deputy Commissioner was acting within the bounds of her delegated jurisdiction and the application for judicial review was properly made to the Superior Court of Ontario. Participants should not make reference to statutes, orders, directives, or government policies other than those set out in the Official Problem.
2. The Official Problem will use Andy’s current pronouns throughout.

Andy's application was heard by Mr. Justice Carl Hend in January 2023. Justice Hend accepted the following facts:

1. Andy was born in November 1997 and grew up in Thunder Bay, Ontario. Andy was assigned female at birth and identified as a cisgender girl during childhood.

2. Andy grew up in a large family with six siblings. Andy's parents divorced when he was very young and he did not have a meaningful relationship with his father after that.

3. Andy had a difficult childhood. He began drinking alcohol at age 15 and quickly began abusing it. Andy started skipping school most days to spend time with a friend, Leia Lindon, whose father bought alcohol for Andy and Leia to drink.

4. Andy's grades began to drop and his mother threatened to kick him out of the house if he did not stop drinking. Andy failed Grade 10 and his mother demanded that he leave as she was concerned that he was a bad influence on his siblings. Andy moved in with Leia and her father and dropped out of school.

5. Andy began to develop feelings for Leia. At the same time, Andy began to feel more and more uncomfortable in his teenage body. Andy deliberately dressed in baggy clothing to hide his breasts and cut his hair short.

6. One evening, Leia confided in Andy that Leia's father was abusive towards her, often hitting her while he was drunk and occasionally making inappropriate sexual comments. Andy felt protective of Leia and confessed his feelings for her. The two began a romantic relationship and discussed running away from Thunder Bay.

7. Not long after, Andy awoke one evening and heard Leia's father physically assaulting her. Andy attacked Leia's father, hitting him with a frying pan and knocking him unconscious. Andy and Leia decided to flee Thunder Bay and stole Leia's father's car. They drove east towards Ottawa but were arrested shortly after leaving.

8. Andy was charged with aggravated assault and theft of a motor vehicle, with Leia being charged as an accomplice. As both were under the age of majority, they were tried under the Youth Criminal Justice Act. Both were convicted and sent to a youth custody facility for female-identified youth for three years. Their romantic relationship continued.

9. After their release, Andy and Leia moved to Ottawa. Both continued drinking and could not find steady employment, often living in shelters or on the street. Both began using harder drugs and began stealing to fund their drug use.

10. By October 2018, Leia and Andy were squatting with several other unhoused people in an abandoned warehouse building. Around this time Leia told Andy that she had become romantically involved a man who was living in the same building and did not want to see Andy. Enraged, Andy attacked Leia. The two had a bitter argument that escalated when Leia pushed Andy. Andy pushed Leia back and she fell, hitting her head against the wall and losing consciousness. Passersby heard screaming coming from the abandoned warehouse where Andy and Leia were staying and called the police. Leia was rushed to the hospital in critical condition. Although she survived the attack, she had suffered permanent brain injury. Andy was arrested and charged with aggravated assault. He was also charged with possession of stolen property and possession of methamphetamine.

11. In July 2019, following a trial at which he unsuccessfully advanced a defence of self-defence, Andy was sentenced to 12 years' imprisonment at the Victoria Beach Institution. Andy entered a drug rehabilitation program offered at Victoria Beach but suffered intense withdrawal symptoms. Andy also frequently lashed out at guards and was involved in altercations with other inmates. He continued to feel uncomfortable in his body and asked to use separate bathroom and shower facilities, which Victoria Beach accommodated.

12. In June 2021, following continued misconduct, the Institutional Head of Victoria Beach Institution, Moise Shelton, referred Andy to a counselling and therapy program being offered at Victoria Beach Institution on a trial basis to inmates with consistent behavioral issues.

13. As the counselling program continued, Andy explored his gender identity issues with his counsellor. Andy came out as trans in October 2021, began publicly identifying as male, and started to use he/they pronouns. Andy also began hormone replacement therapy in

January 2022.

14. The combination of the therapy program and coming out as trans had an immediate positive effect on Andy. His behavioral incidents decreased markedly and he began part time work in the prison canteen, allowing him to earn money for the first time.

15. However, other inmates grew increasingly uncomfortable with Andy's transition. His hormone therapy led Andy to develop a deeper voice and increased body hair. Although Andy continued to use separate shower and bathroom facilities, inmates made insulting comments about his changing appearance and largely ostracized him.

16. In March 2022, Andy's roommate Kayla (with whom Andy had previously gotten along) asked to be transferred to a different cell, stating that she "didn't feel safe sharing a cell with a man when this is supposed to be a women's prison." Kayla's request was refused and shortly after, four of Kayla's friends attacked Andy in a common area. He suffered cuts and bruising. Andy was found to be not at fault for the incident.

17. Following the implementation of the Directive, Ms. Shelton developed an Individual Protocol in consultation with Andy. Andy's Individual Protocol permitted him to live in a single occupancy cell, use male inmate clothing, and allowed Andy access to male effects and products not otherwise available at Victoria Beach, such as facial hair trimmers.

18. Despite the Individual Protocol, Andy continued to feel isolated and ostracized at Victoria Beach. He felt increasingly out of place in a women's institution and began to consider a transfer to the nearby East Hawk Institution, which was male-only. Andy also applied for gender-affirming surgery, but was told that there was a waitlist and he would not receive surgery until 2024 at the earliest.

19. In June 2022, Andy made a formal Transfer Application under the Directive. Pursuant to the Directive, Andy's Transfer Application was referred to the Assistant Deputy Commissioner, Linda Qi, for a decision. On July 24, 2022, Ms. Qi issued the Decision, providing the following written reasons:

Mr. Lemoine's Transfer Request to East Hawk Institution is denied.

Mr. Lemoine has advised me that he wishes to transfer to East Hawk Institution because it aligns with his gender identity. He has also advised that he is subject to bullying and isolation at Victoria Beach Institution, which he attributes to his gender identity and transition process. According to Mr. Lemoine, he would feel more at ease surrounded by male-identified inmates where his gender identity aligns with the others. He submits that this would have a positive impact on his mental health and overall well-being.

I have also received submissions from Ms. Shelton, the Institutional Head at Victoria Beach Institution. Ms. Shelton has confirmed that Mr. Lemoine has been subject to incidents of bullying and abuse at Victoria Beach. Ms. Shelton has also advised that Mr. Lemoine has an Individual Protocol in place that has helped to mitigate the negative impacts of Mr. Lemoine's transition. Finally, Ms. Shelton informed me that Victoria Beach offers an intensive therapy and counselling program that has had a positive effect on Mr. Lemoine's well being. Before the program began, Ms. Shelton said that Mr. Lemoine was a "problem inmate" who was frequently involved in altercations and verbal abuse towards other inmates. Harjit Khan, the Institutional Head at East Hawk Institution, provided an assessment of the Transfer Request from the perspective of the receiving institution. Mr. Khan submitted that there are several concerns with the proposed transfer. First, East Hawk has both medium and maximum-security sections of the institution and cannot accommodate any additional inmates in the medium-security section. This would require Mr. Lemoine to be housed together with maximum security inmates, placing Mr. Lemoine at increased risk of physical harm. Second, as East Hawk does not offer the same intensive therapy and counselling programs as those offered at Victoria Beach, Mr. Lemoine would have to attend these programs off-site at increased expense. Third, Mr. Khan noted that there have been significant issues of violence directed at previous trans inmates at East Hawk, and that some have requested to transfer back to their former institutions as a result. Finally, East Hawk would not be able to offer Mr. Lemoine single-cell accommodations due to a lack of capacity, necessitating a change to his Individual Protocol.

Considering these submissions, and taking into account my duty to ensure the overall well-being of all inmates as well as Mr. Lemoine, I conclude that it is not in Mr. Lemoine's best interests, nor in the interests of other inmates, for Mr. Lemoine to transfer to East Hawk Institution. While I am sympathetic to Mr. Lemoine's desire to be placed in an institution that aligns with his gender identity, such a transfer would plainly put Mr. Lemoine at an increased risk of harm. Not only have there been previous instances of violence directed at trans inmates at

East Hawk, Mr. Lemoine would be transferred to a maximum-security section of the prison which would exacerbate these risks. I also note that Mr. Lemoine has a history of violence and verbal abuse towards other inmates, and an extensive criminal record involving past instances of assault.

It is plain to me that, although significant efforts are being made to counter transphobia in Canadian penitentiaries, trans inmates are at significantly heightened risk of harm. Such harm is particularly acute for trans inmates who have not undergone gender-affirming surgery. This harm would extend to other inmates at East Hawk Institution due to the increased violence that would inevitably follow Mr. Lemoine's transfer. In my experience, the transfer of trans inmates is most successful after they have undergone gender-affirming surgery. In addition, Mr. Lemoine has made significant progress while at Victoria Beach Institution, including by attending intensive therapy and counselling and through the implementation of the Individual Protocol. Although it may be possible to continue some of these measures at East Hawk Institution, that may come at significant expense and inconvenience. I am mindful of my responsibility to ensure the responsible allocation of the limited resources at our disposal. It is my conclusion that those resources are best spent providing Mr. Lemoine with continued support at Victoria Beach Institution.

Finally, I note that all parties agreed that there was no other suitable institution in Ontario for male-identified inmates available other than East Hawk Institution. Although it may be possible to transfer Mr. Lemoine to a suitable institution in another province, Mr. Lemoine indicated that he was not interested in an out-of-province transfer, and I must respect his wishes.

20. In his affidavit in support of his application, Andy stated in part:

Ms. Qi's decision not to allow my transfer to East Hawk Institution has already had a significant impact on my mental health. I have barely been able to sleep or eat since. I spend my days in isolation and have hardly any contact with other inmates. While both Ms. Qi and Ms. Shelton talk a lot about my Individual Protocol, the only thing it does for me is keep me isolated. The few other inmates I interact with all avoid me or bully me. They see me as a freak and say that I do not belong in the same prison as them. I was jumped by other inmates too, so I do not understand when Ms. Qi says that I am safer at Victoria Beach. I do not feel safe at Victoria

Beach. More importantly, I feel that I am being forced to stay at a place that characterizes me as a woman when I am a man.

I read Ms. Qi's decision to say that only inmates who have undergone gender-affirming surgery should be able to transfer to another institution. I want to have gender-affirming surgery and it is not my fault that I have not been able to. I should not be punished for delays that are out of my control. Every day I am forced to live in a woman's institution is another day that I feel that my identity is not being respected or valued.

21. Andy also tendered expert opinion evidence from Dr. Carson Santino, a psychiatrist who specializes in gender affirming care, including in prisons. Dr. Santino's evidence was accepted by the Court as follows:

(a) Trans people have significantly higher instances of severe psychological distress compared to the cisgender population. Nearly 40% of trans people report experiencing some form of psychological illness, compared to 15% of the cisgender population. (b) Over 90% of trans people report having experienced verbal or physical harassment in the past year. They are 175% more likely to be victims of sexual violence than cisgender people. Approximately 18% of trans people experience homelessness in their lifetimes, and they are four times more likely to be living below the poverty line than cisgender people.

(c) Trans inmates make up less than 1% of the adult prison population in Canada. However, they are more than twice as likely to be assaulted, abused, or bullied compared to cisgender inmates.

(d) Trans inmates incarcerated in prisons that do not conform to their gender identity suffer significantly worse mental health outcomes than trans inmates who are in prisons that conform to their gender identity, including increases in feelings of depression, anxiety, and episodes of self-harm.

(e) Undergoing gender-affirming surgery or starting hormone replacement therapy does not make someone "more" or "less" trans. Trans people may choose not to undergo gender-affirming surgery or take hormone replacement therapy for many reasons, including the risk of side effects or allergic reactions which may occur in rare instances.

(f) Trans individuals who do choose to undergo gender-affirming surgery or start hormone replacement therapy often report improved mental health outcomes, including decreases in depression and anxiety and a decreased risk of suicide and self-harm.

22. On cross-examination, Dr. Santino conceded that:

(a) For trans people who do not undergo or have not undergone gender-affirming surgery, the availability of therapy and counselling has a significant impact on promoting positive mental health outcomes.

(b) Trans inmates are at increased risk of physical harm from other inmates compared to cisgender inmates regardless of whether they are in an institution that conforms to their gender identity. Transferring to an institution that conforms with an inmate's gender identity does not consistently reduce the risk of physical harm. In some instances, the risk can be exacerbated.

(c) Continuity of accommodation protocols in place for trans inmates who transfer to a new institution is essential. Without this continuity, trans inmates who transfer to a new institution are more likely to report increased feelings of depression, anxiety, and isolation.

23. The Commissioner of Corrections, Deme Palsson, provided evidence that:

(a) Canadian penitentiaries are under severe budgetary constraints. Those constraints are especially acute at East Hawk Institution, which has suffered from overcrowding and underfunding for several years. East Hawk Institution is also understaffed, which has been a contributing factor to an increase in violence observed there over several years.

(b) Trans inmates in all prisons are often singled out for verbal and physical abuse. While this risk exists regardless of whether the inmate has undergone gender-affirming surgery, it is more acute where the inmate must use separate bathroom and shower facilities, which more easily identifies them as trans. Ms. Palsson claimed that "it is not uncommon for trans inmates who have transferred to a new institution to ask to return to their former institutions due to physical safety concerns."

(c) East Hawk Institution is planning to start a similar intensive counselling and therapy program as that offered at Victoria Beach Institution, although no start date for the program has been announced.

24. On cross-examination, Ms. Palsson conceded that East Hawk Institution has successfully integrated two trans inmates within the past year, one of whom had undergone gender-affirming surgery and the other who had not, with minimal instances of violence and abuse. Finally, Ms. Palsson admitted that she is only aware of two instances of a trans inmate in Canada returning to their former institution after a transfer, and that this was due in part to space constraints at the receiving institution.

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Mr. Justice Hend dismissed Andy's application in January 2023, holding, in part:

The Decision was reasonable and did not violate section 7 or section 15 of the Charter.

I begin with considering section 7 of the Charter. The guarantee of "liberty" in the Charter protects basic choices going to the core of what it means to enjoy individual dignity and independence. As an inmate, Mr. Lemoine's liberty interest was already limited.

However, that does not mean that inmates in Canada lose this right entirely. Our courts have recognized the concept of "residual liberty" that subsists even when a person has been incarcerated. However, residual liberty is engaged only where an inmate is subject to a more restrictive form of incarceration or institutional setting. The Decision kept Mr. Lemoine where he was. It did not further limit his residual liberty and therefore did not engage the right to liberty.

The evidence before me demonstrates that transferring Mr. Lemoine to East Hawk Institution would have placed him at increased risk of serious physical harm. It would also have exacerbated the psychological harm he was suffering by depriving him of the supports offered at Victoria Beach Institution. Mr. Lemoine urges this Court to consider gender identity and expression, and prisoner status, as analogous grounds of discrimination under section 15 of the Charter. I decline to do so. I note that prisoner status has been rejected as an analogous ground by the Supreme Court of Canada and I am bound by that decision. I also see no need to recognize gender identity and

expression as an analogous ground. Rather, issues of gender identity can be subsumed into the consideration of the enumerated ground of sex in section 15 and may also implicate the analogous ground of sexual orientation.

That said, I find that the Decision engaged Mr. Lemoine's right to equality. The essential question I must then consider is whether the Regional Deputy Commissioner reasonably considered and balanced Mr. Lemoine's Charter rights against the goals of the Directive and limited those rights no more than was necessary. In my view, the Regional Deputy Commissioner properly considered the evidence before her and the Decision reflects a proper balancing of the statutory objectives of the Directive, in particular by ensuring that resources are allocated where they are most needed and by accounting for the well-being of all inmates.

Because I find that the decision was reasonable, I do not need to consider the issue of what remedies are appropriate. That said, I find it difficult to conceive of any circumstance where I would mandate Mr. Lemoine's transfer to another institution. That decision must ultimately rest with the Regional Deputy Commissioner on the facts of each case. Had I found the Decision to be unreasonable, I would have remanded Mr. Lemoine's Transfer Application to be reconsidered by the Regional Deputy Commissioner in light of my reasons.

Andy has been granted leave to appeal the court's judgment to the Ontario Court of Appeal on the following issues:

- (1) Did the Decision infringe Andy Lemoine's rights to life, liberty, and security of the person under section 7 of the Charter?**
- (2) Did the Decision infringe Andy Lemoine's equality rights under section 15 of the Charter?**
- (3) If the answer to either of questions 1 or 2 is "yes", is the infringement a reasonable limitation on those rights?**
- (4) If an infringement is found and cannot be upheld as a reasonable limitation on Andy Lemoine's Charter rights, is this an appropriate case for an award of damages pursuant to section 24(1) of the Charter and for making an order compelling Andy's transfer to East Hawk Institution?**

Note that the Court of Appeal will not consider any legislative or adjudicative facts other than those found by Justice Hend.

Note that participants are not asked to assess the quantum of damages awarded.

Schedule “A”

Commissioner’s Directive 85 – Accommodation and Transfer of Gender Diverse Inmates

1.0 Purpose:

The Correctional Service of Canada (CSC) is committed to meeting the needs of its gender diverse population in ways that respect their human rights, ensures their safety and dignity, and protects the safety of others in institutions. Decisions regarding the accommodation and transfer of gender diverse inmates shall be made in accordance with this Directive.

2.0 Definitions:

In this Directive:

Gender means a system that operates in a social construct to classify people, often based on their assigned sex. In many contexts, this takes the form of a binary classification of either “male” or “female”; in other contexts, this includes a broader spectrum.

Gender diverse is an umbrella term for gender identities or gender expressions that differ from dominant cultural or societal expectations based on sex assigned at birth, which encompasses all gender identities (e.g., non-binary, transgender, two-spirited, etc.).

Gender expression means the way gender is presented and communicated to the world through clothing, speech, body language, hairstyle, voice and/or the emphasis or de-emphasis of body characteristics or behaviours.

Gender identity means a person’s internal and individual experience of gender.

Sex means the biological classification of a person as female, male or intersex. It is usually assigned at birth based on a visual assessment of external anatomy.

Sex is primarily associated with physical and physiological features, including chromosomes, gene expression, hormone levels and function, and reproductive/sexual anatomy.

3.0 Responsibilities:

The Institutional Head shall:

a) Ensure that a process is in place to accommodate the needs of gender diverse inmates through the development and adherence to Individual

Protocols;

b) Ensure inmates have access to external resources and networks that provide support to gender diverse inmates; and c) Provide an evaluation and assessment of whether a Transfer Request is in the best interests of the inmate and the Institution.

The Regional Deputy Commissioner shall:

a) Be responsible for ensuring the safety of all inmates;

b) Upon receipt of a Transfer Request, provide an assessment and decision regarding the Transfer Request after having received submissions from the inmate concerned, and the Institutional Heads of the sending and receiving institutions in accordance with this Directive; and

c) Oversee the budget for all institutions within their jurisdiction in order to allocate limited resources where they are most needed, to promote the best interests of all inmates and institutional staff.

4.0 Individual Protocol:

The Institutional Head shall establish an Individual Protocol for accommodating any gender-diverse inmate upon receipt of an accommodation request from an inmate or where the Institutional Head determines it would be in the inmate's best interests. If an inmate subject to an Individual Protocol is transferred to another institution, the Institutional Heads of the sending and receiving institutions shall collaborate to ensure, to a reasonable extent, that the transferring inmate maintains the Individual Protocol in the receiving institution.

5.0 Transfer Requests:

Inmates may apply for a voluntary transfer to a men's or women's institution according to their gender identity or expression.

A Transfer Request shall be made to the Regional Deputy Commissioner. The Regional Deputy Commissioner shall assess each Transfer Request on a case-by-case basis and issue a Transfer Decision.

In making a Transfer Decision, the Regional Deputy Commissioner shall:

- a) Consult with the inmate;
- b) Consult with the Institutional Heads of the sending and receiving institution, who shall be responsible for providing a security assessment and an assessment of the resources available to the inmate at each institution;
- c) Ensure that the Decision prioritizes the inmate's well being, safety, and the safety of other inmates in the affected institutions;
- d) Consider the existing Individual Protocol in place for the inmate, including whether it can be implemented at the receiving institution;
- e) Consider the inmate's past criminal record and behavioural history while incarcerated; and
- f) Consider other resources and services provided to the inmate, including whether the inmate has undergone gender-affirming surgery, and include an assessment of these considerations in the Decision.