

**THE NORTHWEST TERRITORIES HUMAN
RIGHTS ADJUDICATION PANEL**

**IN THE MATTER OF The Northwest Territories
Human Rights Act, R.S.N.W.T, 2002. as amended,**

BETWEEN:

GABRIELLE LANDRIE

Complainant

-and-

**The Government of the Northwest Territories
and J. Michael Miltenberger
Respondent**

Reasons for Decision

Before: James R. Posynick, Adjudicator

Appearing:

Gabrielle Landrie, Self-represented

Brad Patzer, Legal Counsel for the Respondents

Karen Lajoie, Legal Counsel for the Respondents

Place of Hearing: Fort Smith, NT

Dates of Hearing: December 4, 2012; January 21, 22, 23, 24, 2013.

Statutes considered:

Sections 5 and 11 of the NT *Human Rights Act*.

REASONS FOR DECISION

INTRODUCTION

[1] Gabrielle Landrie filed a human rights complaint with the NWT Human Rights Commission on or about January 10th, 2012. In it she alleged the Government of the Northwest Territories (“GNWT”) and a Minister of the GNWT, J. Michael Miltenberger denied her goods, services, accommodation or facilities that are customarily available to the public because she is a transgendered person.

[2] The GNWT and Mr. Miltenberger do not dispute Ms. Landrie’s gender identity nor that transgendered persons are the subject of stereotypical and derogatory perceptions in Canada. They say that Ms. Landry was not denied any goods, services, accommodation or facilities customarily available to the public but if there was any such denial, it was based on safety issues that arose at the time and not on her gender identity.

SUMMARY

[3] Gabrielle Landrie, a transgendered person, was a full time student at Aurora College (the “College”) in Fort Smith in December of 2011. On December 9th, 2011, Ms. Landrie went to the College to complete final exams and assignments for the fall semester. She had to dress-up for a mock employment interview scheduled at the College that day and wore a dress and high heels.

[4] On the same day the Right Honorable David Johnston, the Governor General of Canada was visiting the College. He was to meet with students and staff in the College foyer after attending a round table discussion in the Library at the other end of a hallway connecting the two places. Ms. Landrie became aware of the Governor General’s presence in the school during her morning exam. After the exam she met her best friend (the “Friend”) in the adjoining hallway and they talked about their exams and mock interviews.

[5] While standing there the two women were approached by an RCMP constable who had a short conversation with Ms. Landrie. Shortly after that Mr. Miltenberger approached them. He appeared quite serious and spoke directly

and sternly to Ms. Landrie about their presence in the hallway. Ms. Landry was upset by his choice of words and his demeanor.

[6] Ms. Landrie's Friend left the hallway and Ms. Landrie went into an adjacent computer lab to complete another final assignment. While she was seated in the lab Mr. Miltenberger entered the doorway and made some comments to her. Mr. Miltenberger's comments further offended Ms. Landrie.

[7] Ms. Landrie felt the reason Mr. Miltenberger wanted her out of the hallway and the reason for his apparent sternness and anger was related to her gender identity.

[8] Having heard the testimony of several witnesses, I conclude that the respondent was denied access to school facilities that are customarily available to the public however the reason for the denial was not, in whole or in part, related to Ms. Landrie's gender identity.

C. Issues for Decision

- [9] **1. Was Ms. Landrie denied access to goods, services or facilities customarily available to public?**
2. Was the denial based, in whole or in part, on Ms. Landrie's gender identity?

D. Findings of Fact

i. Transgenderism

[10] I heard testimony from an undisputed expert on Transgenderism, Dr. Lorne Warneke, M.D., FRCP. He has written that "Transgenderism" is a condition affecting both males and females in which an individual is born of one biological sex but has the gender identity of the opposite sex. These individuals do not want to become a member of the opposite sex but rather feel they are a member of the opposite biological sex."¹

¹ The Transgender Phenomenon, Lorne Warneke MD, FRCP and Sandi Barsi RPN, p. 4 June 2001

[11] According to Dr. Warneke the evidence “strongly suggests that transgenderism is a result of biological/hormonal factors that have probably occurred during fetal life that has directed the gender to go in one direction as opposed to another. Virtually all individuals who are transgendered are aware that they are different in some way from a very early age. Just as with sexual orientation, clearly gender identity is not a choice”.²

[12] The Diagnostic and Statistical Manual of Mental Disorders published by the American Psychiatric Association (DSM IV) recognizes the need for treatment and management of people who are transgendered. However medical, psychiatric and other professional caregivers who help transgendered persons do not view it as a “disorder”. Rather it “... is nothing more than a normal variation on the theme of gender and is part of the human diversity that is social strength”³. Statistics from one large Canadian city suggest a conservative prevalence rate of 1:10,500 transgendered persons in the population.

[13] There are several steps transgendered persons must take before obtaining sex reassignment surgery. The steps are mandatory and medically supervised to facilitate access to health care benefits. For example, a candidate must live one full year in his/her preferred gender role. Name changes and gender changes on official documents must be applied for and regular appointments with medical and psychiatric support must be attended. Finally, medical and psychiatric support for the surgery must be obtained. Ms. Landrie has not yet obtained sex reassignment surgery.

ii. Social Intolerance

[14] Dr. Warneke’s testified that during the past 20 years, social intolerance toward transgendered persons has waned. Nonetheless, they are still apt to experience significant psychological suffering and conflict with others in society. At least part of that suffering is related to experiencing repeated rejection. It conditions them to being sensitive to rejection. Sometimes feelings of anger replace those of rejection. People going through the transgender process experience significant stress especially when they are living openly in the preferred gender.

² Service for Transgendered Individuals, Lorne Warneke MD. FRCP, p. 1, August 2005.

³ Transgenderism, Lorne Warneke, November 2008, p.1.

[15] Since “coming out” at age 35, Ms. Landrie has had stones, branches and bottles thrown at her. She’s been pointed out by groups of men planning to do her harm. She had a group of males try to get into her taxi to harm her on one occasion. She has heard – and occasionally still hears - insults and vulgarities aimed at her from time to time. She avoids confrontation believing that such perpetrators will eventually understand transgenderism and treat her with dignity and respect.

iii. The Events of April 9th, 2011

[16] Determining what was done and said by Ms. Landrie and by the Respondent Miltenberger is crucial to my decision in this case because there were some significant disparities between their testimony and the testimony of Ms. Landrie’s best Friend. The testimony of the Respondent’s witness RCMP Constable Froyland was ambiguous. These disparities and ambiguities raise questions of credibility and reliability. I will summarize their respective testimonies and then give reasons for my findings of fact relating to what took place on April 9th, 2011.

Ms. Landrie’s Testimony

[17] Ms. Landrie went to the College on April 9th, 2011, expecting to write a final exam and attend a mock interview. She was instructed to dress-up for the mock interview so she wore a black lace dress and dress shoes. She took 2 ½ hours to get ready for class that morning.

[18] During her first exam, she saw the Governor General and his wife walk by the classroom into a classroom across the hallway. Also, an instructor came by and asked him to reschedule his mock interview because there was going to be “some sort of Gala in the [College] foyer” and people would “meet up with the Governor General there”. This was the first Ms. Landrie knew of the Governor General’s visit.

[19] When she left the examination room she noticed “guards” in the hallway. They exchanged smiles with Ms. Landrie who walked upstairs to participate in the

mock interview. It went well. She returned to the main floor and noticed more guards walking around, including RCMP. She exchanged greetings with them.

[20] Ms. Landrie met up with her best Friend in the hallway. RCMP Constable Froyland approached her and said “Hello Gabrielle, how are you doing?” She said “Fine” and asked him what was “going-on”. Constable Froyland said he was there “to help set things up” for the Governor General. Ms. Landrie asked if they would “get a chance to meet him, shake his hand” and Constable Froyland said that could not happen in the hallway. Mr. Landrie’s response was “Oh that’s understandable”. Then Constable Froyland said they could shake his hand in the foyer and Ms. Landrie responded “Perfect!” They then had a brief conversation about Constable Froyland’s “next stop” being in Hay River.

[21] Ms. Landrie and her Friend continued to walk towards the foyer doors. They stopped by the Computer Laboratory and had a conversation about their mock interviews. They discussed Ms. Landrie’s dress. She noticed Mr. Miltenberger walk by quickly with a guard. Ms. Landrie smiled at him and Mr. Miltenberger “glared” at her. Ms. Landrie and her Friend continued talking.

[22] Moments later Mr. Miltenberger approached the two women. Mr. Miltenberger stood facing Ms. Landrie who was much taller than him and said “You spooked the Governor General. You’ve gotta leave”. Ms. Landrie gave a “Ya, ya” response and turned her back to Mr. Miltenberger. She heard Mr. Miltenberger say “You, you gotta leave because you ain’t gonna see him”. She “sluffed-off” both comments.

[23] Ms. Landrie and her Friend started walking toward the foyer. They could see “everybody was gathering” there. An instructor stopped Ms. Landrie and asked if she handed-in her accounting project and, realizing she had not done so, Ms. Landrie told her Friend she would meet her outside and she returned to the computer lab.

[24] While she was seated in the lab, Mr. Miltenberger walked in and said: “I thought I told you to leave these premises...Well you aint’s gonna see the Governor General. He doesn’t want to see you”. She felt Mr. Miltenberger was angry. Ms. Landrie’s response was “Fine but my homework is coming first” and

she stayed seated. Mr. Miltenberger then said a second time “I told you to leave these premises”.

[25] She felt “singled-out” because Mr. Miltenberger did not speak to any other women that way. She felt cornered because Mr. Miltenberger blocked the doorway momentarily. She felt she would not be able to see the Governor General because of her gender identity. She was upset but did not want to cause a scene. When she left the lab she walked away from the foyer towards the library. Nobody was in the hallway. She walked outside and around the building, by the foyer to meet her Friend who was waiting to drive her home.

[26] Ms. Landrie was furious. She felt mistreated and disrespected. She heard rumours that she was “hailed out of the College kicking and screaming by the guards”. She filed a human rights complaint. She felt the College let her down because it did not “stand up” for her. She stayed away from classes and then tried to write 2 remaining exams. She failed both. She was encouraged by the College president to stay in school but she left.

Cross Examination of Ms. Landrie

[27] Ms. Landrie stated when she and her Friend were in the hallway other students were either in the foyer waiting for the Governor General or in classrooms. She saw none in the hallways when she spoke to Constable Froyland.

[28] Ms. Landrie stated when Mr. Miltenberger approached her he said “You spooked the Governor General. You gotta leave”. He said nothing else. Ms. Landrie said she understood “spooked” to mean “to intimidate, fear, scare...where fear is put into a person”.

[29] She said there was a second conversation with Mr. Miltenberger not more than 10 minutes later. She was still talking to her Friend. This time Mr. Miltenberger said words to the effect that the Governor General would not come down the hall and was changing his route to avoid her “at all costs”. She said Mr. Miltenberger also stated at this time “You have to leave the premises”. After that, Ms. Landrie says she and her Friend walk towards the foyer, her Friend left and Ms. Landrie returned to the computer lab.

[30] On further cross examination, Ms. Landrie quoted Mr. Miltenberger as stating on the second occasion “I thought I told you to leave the premises” after which she “tried to sluff it off again”. She said her Friend was there for the first and second conversations.

[31] Ms. Landrie confirmed there was a third conversation with Mr. Miltenberger in the computer lab where he said “I thought I told you: you have to leave”. She said Mr. Miltenberger “took off angry”. She denied being told by Mr. Miltenberger that the Governor General had left the College.

The Best Friend’s Testimony

[32] Ms. Landrie’s Friend testified that she knew before going to the College the Governor General was going to be in the College foyer by noon of April 9, 2011. She attended her mock interview that morning and when she left, she saw no guards around and was not told to clear the hallway.

[33] She met Ms. Landrie near the computer lab. A “guard” came over and said “hi” to Ms. Landrie. None of the guards spoke to her. Michael Miltenberger approached them once and although he glanced at her, he spoke directly to Ms. Landrie saying they had to leave and “you spooked the Governor General”. Ms. Landrie said “alright”, they spoke a few minutes longer and then they ran into an instructor who told him to print his last assignment.

[34] The Friend left the College, started her truck and came back inside the foyer to wait for Ms. Landrie, to give her a ride home. Ms. Landrie came out and appeared to be upset. Ms. Landrie told her Mr. Miltenberger said words to the effect that the Governor General was not going to attend the foyer because Ms. Landrie “spooked” him.

The Best Friend’s Cross-examination

[35] The Friend confirmed that her conversation with Ms. Landrie by the computer lab lasted for “some time”. She said there were no students in the hallway at that time “...they were all in the foyer”.

[36] She recalled Ms. Landrie talking to a “guard” but she was neither “introduced or acknowledged” and did not hear what was said but she agreed that Ms. Landrie saying she wanted to meet the Governor General and shake his hand sounded familiar. She did not recall being told at the time to move to the foyer and, if she did, she would have “obeyed the rules and ... left right away”.

[37] A few minutes later Mr. Miltenberger approached them. He stood in front of and looked directly at Ms. Landrie. He said sternly “You’ve spooked the Governor General”. He seemed annoyed. She did not feel he was talking to her. He glanced at her and then said the hallways were supposed to be cleared. She understood that to mean they both should leave and she did so. She said Ms. Landrie’s responded “like she understood and she agreed...” and the best Friend said she would go out and start the truck and wait for her. The entire conversation with Mr. Miltenberger was very quick.

Mr. Miltenberger’s Testimony

[38] Mr. Miltenberger was a Minister of the GNWT in April of 2011 but he was not in charge of the Education portfolio. He attended the visit of the Governor General as a representative of the GNWT. The visit of a Governor General is an important event and it took place in his home constituency. The cabinet agreed he should attend. He had no role in organizing the event although he did ensure the Governor General’s entourage was given the names of community and territorial government officials to work with.

[39] Mr. Miltenberger was an observer during the round table discussion in the College Library and he left to go to the foyer while people were getting their pictures taken with the Governor General. When he arrived at the foyer it was “a beehive” of more than 50 people. From the foyer he noticed Ms. Landrie in the hallway.

[40] He spoke with Constable Froyland who said there “may be an issue with security” and he gestured at the 2 people who were standing in the hallway the Governor General was to walk through. He said there was a “potential concern and they were trying to decide what to do”. The concern was to clear the hallway for the Governor General to walk to the foyer.

[41] Mr. Miltenberger knew the Governor General's agenda. He wanted it to go smoothly and knew that events would occur quickly. Since it was his constituency, he decided to talk to the two people. He walked the short distance to them and said "Ladies, the Governor General's not going to come down this hallway as long as you're standing out here in the hallway. That you spooked his security". He used the word "spooked" because the Governor General's security expressed concern about the 2 people standing in the hallway. He spoke in a "matter of fact" tone but the words were spoken as a question.

[42] Ms. Landrie's Friend said "No problem, I'll leave" and she did so. Ms. Landrie "pivoted and went into the computer room" and he felt the problem was "solved". He then walked toward the Library and saw the Governor General and 2 security staff going out the "back door".

[43] He walked back to the computer room, put his head in the door and said "Just so you know the Governor General's left the building and nobody's gonna see him down here today".

[44] Mr. Miltenberger recognized Ms. Landrie because she had attended a gathering in the same location 3 years ago, attended by the late Jack Layton. He did not prejudge her because of "how she looks and who she is". What he did "had nothing to do with her personal circumstance".

[45] He stated he did not tell Ms. Landrie that the Governor General changed his route to avoid her.

Cross-examination of Mr. Miltenberger

[46] Mr. Miltenberger has seen Ms. Landrie working in a local department store and driving taxi in Fort Smith. He considers her part of a "minority group" because of her gender identity.

[47] He used the word "spook" to demonstrate "a level of concern" expressed by the security people on site. The use of the word had nothing to do with his view of Ms. Landrie it was related to the security concerns. He thought it was a word that the two females would understand in the context of the security issue.

[48] After seeing the Governor General leave he returned to Ms. Landrie in the computer lab to let her know, “same as the other folks in the foyer”, the Governor General had changed his plans. He did not “single-out” Ms. Landrie in doing so. He thought he was being helpful.

Testimony of Constable Froyland

[49] RCMP Constable Froyland was part of the security detail assigned to assist the Governor General’s security people with his visit to Fort Smith and elsewhere. He was stationed at the main entrance of the College, near the foyer. A meeting with the public was scheduled for the foyer. Afterwards he would be part of the security detail at other locations in Fort Smith.

[50] The security briefing for the College included instructions that the Governor General would meet the general public in the foyer of the College. The movement of students to and from classrooms was acceptable but the hallway between the library and the foyer was to be kept clear when the Governor General was walking through it. There were other events around Fort Smith that day so there were time constraints for each event. The RCMP and the Governor General’s security people were actively involved in making the College secure.

[51] He took no notes of what occurred on April 9, 2011. He knew Ms. Landrie from living in Fort Smith. He did not know her well. He did not know her Friend at all. He saw them standing near the computer lab in the hallway. At the same time there were 30-40 people waiting in the foyer. He walked the hallway 3 or 4 times and noticed the two women standing in the same place. Ms. Landrie appeared to be “standing there waiting”. She had no books in her hands, was not reading and was not accessing the lockers. Nor was her Friend. They were talking.

[52] He spoke with Ms. Landrie briefly. He thought he asked them to stay out of the hallway, to go to a classroom or move to the foyer. He could not recall the words he spoke to Ms. Landrie. He could not recall if her Friend was there at the time. He and other security staff and College staff spoke with other students and people in the school who were standing around and asked them to “continue on their way or to gather in the main foyer”.

[53] After the conversation, he continued with other tasks but noticed Ms. Landrie was still in the hallway. A member of the Governor General's security team asked him if the hallway was clear and who Ms. Landrie was. He had confirmed she was a student at the College earlier and was there to do school work and he told them so.

[54] He then spoke with Mr. Miltenberger. He motioned to the two standing in the hallway and said he was "put off because she wasn't leaving where he had been asked to vacate from and was continuing to hang around in that spot". He recalls teachers and students moving through the hall at this time but Ms. Landrie and her Friend were "standing about" in the same place. He assumed the two females were there to approach the Governor General which was not part of the protocol. He saw Mr. Miltenberger talking to Ms. Landrie but could not hear what was being said. The conversation was "10-15 seconds". The Constable left the hallway shortly after and did not see any further conversations between Mr. Miltenberger and Ms. Landrie.

Constable Froyland's Cross-examination

[55] When he spoke to Ms. Landrie in the hallway, he could not recall whether her Friend was present nor whether there was a discussion with Ms. Landrie about her schooling.

[56] The Constable did not recall whether he told Ms. Landrie to leave the hallway. He may have. He did not know if he made it "that frank". He was trying not to draw attention to the situation and was also talking to other students "wandering around" and he asked them to move along also.

[57] After he left, he grew concerned that Ms. Landrie "hadn't followed my earlier request and direction to leave the hallway and stop standing where she was standing, milling about in the hallway waiting looking as if she was waiting for the Governor General". It "heightened [his] risk assessment".

[58] He saw Ms. Landrie in the computer lab "coming and going" and sitting in front of a computer that morning. He did not recall talking to Ms. Landrie about where he was going after the College assignment that day.

[59] The constable's recollection of his conversation with Ms. Landrie and her Friend was not very good. He remembers only what he intended to do when he spoke to them but not any of the details of the conversation.

Credibility and Reliability

[60] It has been fairly said that "The Law does not clothe the trial Judge with a divine insight into the hearts and minds of the witnesses"⁴. The same applies to human rights adjudicators. It has also been said "...**the** real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions".

[61] In other words: I need to look at the whole of the evidence in this case and consider what a reasonably informed person consider probable in that place and in those circumstances?

The Conversation in the presence of the Friend

[62] In this case we have Ms. Landrie's testimony that Mr. Miltenberger spoke to her 3 times on April 9th, 2011. The first time, in the presence of her Friend, he told her to leave and said she would not see the Governor General. The second time, also in the presence of her Friend, he told her to leave "the premises" and said the Governor General was changing his route to avoid her. The third time Ms. Landrie was in the computer lab and was told, again, to leave".

[63] Mr. Miltenberger says he spoke to Ms. Landrie once in the presence of her Friend, telling them to leave the hallway because the Governor General's security was "spooked". He says he then reported the departure of the Governor General to Ms. Landrie later, while Ms. Landrie was in the computer lab so she would know "same as the other folks in the foyer" that the Governor General had left.

[64] Ms. Landrie's Friend said she was present for one, not two conversations with Mr. Miltenberger. She recalls Mr. Miltenberger saying they had to clear the hallway and that Ms. Landrie "spooked" the Governor General. She said Ms.

⁴ *Faryna v. Chorny* [1952] 2 D.L.R. 354 at 356

Landrie responded “like she understood and she agreed”. The conversation was very quick.

[65] Constable Froyland recalled Mr. Miltenberger talking to both Ms. Landrie and her Friend once. He said the conversation was 10-15 seconds.

[66] Ms. Landrie’s Friend was in the role of observer during the conversation with Mr. Miltenberger. Conversations were not directed to her. She had no emotional investment in what she heard. She was acknowledged only by a glance from Mr. Miltenberger. Having heard her testimony and observed her response to questions from both parties, I believe her testimony reflects what most probably happened.

[67] She said there was one conversation with Mr. Miltenberger whose words she characterized as “cold” and “stern”. She felt he was “annoyed”. She said Mr. Miltenberger told them Ms. Landrie spooked the Governor General and they were to clear the hallways. She said Ms. Landrie “agreed”. The conversation was short. In my view the Friend would have recalled more conversation about changing the Governor General’s route to avoid Ms. Landrie and being told to leave the College had she heard it.

The Conversation in the Computer Lab

[68] Ms. Landrie testified when she was seated in the Computer lab Mr. Miltenberger spoke to her a third time. He said “I thought I told you: you have to leave” and “...you ain’t gonna see the Governor General. He doesn’t want to see you”. He “took off angry”. In her Complaint (filed as an Exhibit) Ms. Landrie says Mr. Miltenberger said the Governor General “was not going to go down the hallway for he did not want to see [her] in any which way or form” and when she explained she was doing her homework “he did not care... and told me to leave. I refused”.

[69] Mr. Miltenberger was made aware of the presence of Ms. Landrie and her Friend in the hallway by Constable Froyland who told him that he was concerned that Ms. Landrie had not left the hallway when told to do so. It is very probable that Mr. Miltenberger’s 1st contact with Ms. Landrie was based on that knowledge and intended to get both females out of the hallway. It does not seem probable,

however, that after they left the hallway – the Friend to the parking lot and Ms. Landrie to the Computer Lab – that Mr. Miltenberger would follow Ms. Landrie into the Computer and ask her to leave.

[70] In my view it is more probable that Mr. Miltenberger's first contact with the two females was hurried and abrupt so that they would get out of the hallway. The testimony of the Friend is that they got that message and were in the process of leaving when Ms. Landrie was reminded of an assignment to do in the Computer Lab. She was there for several minutes or so, enough time for Mr. Miltenberger to walk toward the Library and see the Governor General leaving and return to the Computer lab.

[71] It is also probable that once Mr. Miltenberger learned of the Governor General's change in plans he would report it to Ms. Landrie and to others. It does not seem probable that he would follow Ms. Landrie into the Computer Lab and try to essentially chase her back out into the hallway.

Constable Froyland's Conversation with Ms. Landrie

[72] Constable Froyland did not recall the details of his conversation with Ms. Landrie and her Friend. He remembered only that he approached them with the intention of having them move from where they were standing in the hall.

[73] Both Ms. Landrie and her Friend recalled a discussion with Constable Froyland about getting a chance to meet the Governor General and shaking his hand. Ms. Landrie recalls being told that would not happen in the hallway.

[74] Ms. Landrie and her Friend's recollection of the conversation between Ms. Landrie and Constable Froyland makes sense and most probably occurred. Their testimony lends credence to Constable Froyland's concern that the two of them might be waiting to shake the Governor General's hand in the hallway even though they knew they had to go to the foyer to do that.

Conclusions as to Credibility and Reliability

[75] By finding one witness' testimony more credible or reliable than another, I do not mean to attribute any intention to deceive or embellish to any other

witness. During the material times in this case my observation is that it was a busy and emotionally charged time. It was a final exam day, much preparation, stress and high expectations were part of that. It was a special day because the Governor General was present at the College increasing the number of people on site, affecting ordinary student activities (never mind those associated with 'exam day') and creating excitement and the expectation of meeting such distinguished company. The excitement associated with the Governor General's visit was shared by everyone, students, including Ms. Landrie, staff, RCMP, community and governmental dignitaries.

[76] I accept as credible and reliable Ms. Landrie's testimony about her conversation with Constable Froyland.

[77] I accept as credible and reliable Ms. Landrie and her Friend's testimony about Mr. Miltenberger's 1st conversation with them except for the statement "You, you gotta leave because you ain't gonna see him". The Friend said Mr. Miltenberger referred to the hallways being cleared. I accept that.

[78] I accept as credible and reliable Mr. Miltenberger's description of the first conversation and the conversation in the Computer Lab.

[79] I do not find reliable the testimony of Ms. Landrie to the effect that, in the presence of her Friend, Mr. Miltenberger said the Governor General would not come down the hall and was trying to change his route "at all costs". Ms. Landrie's Friend did not mention those words. Those were words she would have remembered if they were spoken.

Conclusion on Findings of Fact, April 9, 2011

[80] April 9, 2011 was a final exam day at Aurora College in Fort Smith. Ms. Landrie wore her best dress outfit and shoes for a mock interview. During her first exam she noticed the Governor General was in the building. She learned he was going to meet the students in the foyer later in the day.

[81] She met her best Friend in the hallway and Constable Froyland approached them. She asked if she would be able to meet the Governor General and shake

his hand and the Constable said that could happen in the foyer, later, but not in the hallway.

[82] Ms. Landrie and her Friend had a conversation outside the Computer Laboratory doors. Mr. Miltenberger walked by and Ms. Landrie thought he “glared” at her. Both Ms. Landrie and her Friend recognized Mr. Miltenberger as their elected government representative.

[83] Mr. Miltenberger had a conversation with Constable Froyland, a member of the RCMP security detail assigned to assist the Governor General’s security group. Constable Froyland pointed toward Ms. Landrie and her Friend and said they represented a security concern by remaining in the hallways that the Governor General was expected to walk to reach the foyer.

[84] Mr. Miltenberger took it upon himself to act decisively and quickly so the events at the College would go smoothly. He approached Ms. Landrie and her Friend. He stood in front of Ms. Landrie and addressed his remarks to her. He said in a stern, annoyed sounding voice: “The Governor General is not going to come down this hallway as long as you are standing here...You spooked the Governor General [or the Governor General’s security] and you’ve gotta leave”. Ms. Landrie said “alright” and they both headed for the foyer when an instructor reminded Ms. Landrie to hand in a project. She headed to the Computer Lab. Her Friend walked to the parking lot.

[85] While seated in the Computer Lab, Mr. Miltenberger stood in the doorway and stated: “Just to let you know the Governor General’s left the building and nobody’s gonna see him down here today”. Ms. Landrie felt cornered and singled out by Mr. Miltenberger because of her gender identity. She felt mistreated and disrespected. She left the lab via the door opposite the foyer where people were still gathered.

E. ANALYSIS AND DECISIONS

What is “discrimination”?

[86] Discrimination is “a distinction, whether intentional or not but based on [in this case, “gender identity”] which has the effect of imposing burdens, obligations

or disadvantages on [a person which are] not imposed upon others, or which withholds or limits access to opportunities, benefits and advantages available to other members of society” (*Andrews v. Law Society of B.C.* [1989] 1 S.C.R. 143).

[87] Section 5(1) of the *Human Rights Act* prohibits discrimination against persons on the basis of their gender identity.

[88] Section 11(1) of the *Act* prohibits the denial of goods, services or facilities that are customarily available to the public [on the basis of gender identity] without a *bona fide* and reasonable justification.

[89] Section 11(2) says that a *bona fide* and reasonable justification requires proof that accommodation of the needs of the affected individual would impose undue hardship on the person who would have to accommodate those needs.

[90] “Accommodation” means the responsibility to adapt or adjust facilities to meet the needs of an individual having a characteristic (gender identity) protected by the *Act*.⁵

Issue 1. 1. Was Ms. Landrie denied access to goods, services or facilities customarily available to public?

Ms. Landrie’s Position

[91] Ms. Landrie says that Mr. Miltenberger tried to have her removed from the College premises. She calls it a “misuse of powers”.

The Respondents’ Position

[92] The Respondents say Ms. Landrie was not denied services or facilities. She was asked to leave the hallway, not the College premises and since Mr. Miltenberger was not a College official, he had no authority to decide who may or may not remain on the College campus.

Analysis and Decision

⁵ *Arnold v. Canada (HRC)* [1997] 1 F.C. 582 (T.D.)

[93] Ms. Landrie was a student at the College. As such he was a member of the public enrolled there. Mr. Miltenberger is a well known member of the Legislative Assembly of the Northwest Territories. He was certainly recognized as such by Ms. Landrie and her Friend.

[94] I do not believe it matters whether Mr. Miltenberger (or any other GNWT official) had actual authority to tell Ms. Landrie what to do in the circumstances of this case. His actions might be construed as having exerted ostensible authority, i.e. by conducting himself as though he had authority from the College, Ms. Landrie relied on that representation (by her actions) and the result was a change to Ms. Landrie's position, legally and literally. On the other hand, Section 4 of the Act binds the GNWT (and its agents) to comply with it. Mr. Miltenberger wanted to clear the hallway and he did what he thought was necessary to do so.

[95] Access to the school facilities is essential to the 'public' attending the College, i.e. the students. Depriving students of access to areas of the college that are *not* restricted for some legitimate and operational requirement for reasons prohibited by Section 5 of the *Human Rights Act*, e.g. gender identity, may be discrimination under the Act.⁶

[96] I made no finding of fact suggesting Mr. Miltenberger tried to have Ms. Landrie removed from or leave the College premises. In this case Ms. Landrie was denied access to the hallway of the College by Mr. Miltenberger and I find that to be a denial of access to facilities customarily available to the public.

Issue 2. Was the denial based, in whole or in part, on Ms. Landrie's gender identity?

Ms. Landrie's Position

[97] Ms. Landrie says she was singled out because she is a transgendered person. She suggests "If it was any other woman other than [her and her Friend] standing in the hallway" he would not have spoken in a "...judgmental" manner to them, talk "in an angry tone" and say "You spooked the Governor General! You have to leave."

⁶ University of B.C. v. Berg [1993] 2 S.C.R. 353

The Respondents' Position

[98] The Respondents say that Ms. Landrie was treated exactly the same as her Friend. She was not "singled-out".

[99] The Respondents also say the Respondents had a *bona fide* and reasonable justification for their conduct, i.e. the security and personal safety of the Governor General.

[100] Finally, the Respondents say there is no 'nexus' or connection between the denial of facilities and Ms. Landrie's gender identity. The safety and security concerns were applicable to all of the students as Constable Froyland's testimony indicated, not just Ms. Landrie. She was not denied access, in whole or in part, because she is a transgendered person.

Analysis and Decision

[101] There is no doubt in my mind that the security of the Governor General, his wife and entourage was an extremely high priority on April 9, 2011. That was so for everyone directly involved in the supervision and management of the event. Testimony from Constable Froyland confirmed that the security team was vigilant and kept a lookout for activities that might disrupt the Governor General's plans.

[102] Constable Froyland was clear on his own role. He spoke about how he, other members of the team and college staff were keen to keep the hallway adjoining the Library to the Foyer clear of loiterers. They asked those who lingered between classes or other destinations to move-on or go to the foyer.

[103] My findings of fact demonstrate that two students, Ms. Landrie and her Friend, did not appear to have any intention of moving-on when first spotted by Constable Froyland. They had already been given at the very least a subtle hint by the Constable that they must go to the foyer to greet the Governor General. They remained in the hallway. They had the appearance of staying put. Ms. Landrie had already expressed an interest in shaking the Governor General's hand. The Constable was concerned; other security staff expressed concern.

[104] Mr. Miltenberger became concerned, too. He was told the Governor General's security team was concerned about their presence in the hallway. He took it upon himself to get them out of there to facilitate the completion of the Governor General's planned reception in the foyer. It is not unlikely that what Mr. Miltenberger described as a "matter of fact" voice was stern if not "annoyed" sounding.

[105] I do not find the use of the word "spooked" as interpreted by Ms. Landrie to be inappropriate, abusive or derogatory in the circumstances. The security concern expressed by the Constable to Mr. Miltenberger was reasonably interpreted by him as creating a concern, a fear that Ms. Landrie and her Friend did not intend to move to the Foyer as required. The evidence I received regarding transgendered persons, generally, especially the social obstacles they face, and Ms. Landrie's life experience and apparent courage in being who she is in the face of those obstacles, leads me to believe her personal feelings of being disrespected by the use of the word were real.

[106] But the use of the word does not, in the circumstances of this case, lead me to infer Mr. Miltenberger was disrespectful of her. The use of the word to show the Governor General or his security staff was concerned or 'afraid' of a security incident in this case does not suggest to me that she was asked to move out of the hall because of her gender identity. She was asked to move because of a *bona fide* security concern that she had been made aware of earlier in the morning by Constable Froyland.

[107] Nor do I find the return of Mr. Miltenberger to the Computer Lab and his comments there to be discriminatory. He reported the Governor General's departure to her. His words may have expressed some frustration because the Governor General was leaving without completing his itinerary at the College but, in all of the circumstances, I am not able to attribute his comments or actions to Ms. Landrie's gender identity. As I noted above, I believe Mr. Miltenberger's testimony because it fits with the whole of the evidence about what happened that day.

[108] I do not have to find any intention on the part of the Respondents in order to find discrimination has occurred. Nor do I have to find that gender-identity was anything more than a factor in the decision made to deny facilities in this

case. I find it was not a factor here. I am aware that discrimination can take the form of derogatory comments or subtle actions but I find neither here. The evidence does not suggest it was more likely than not Mr. Miltenberger's words or actions resulted in whole or in part because of Ms. Landrie's gender identity. In short, there is no nexus or connection proven between the words and actions taken by Mr. Miltenberger and Ms. Landrie's transgenderism.

I dismiss the complaints against the GNWT and Michael Miltenberger.

Dated this 2^{7th} day of May, 2013.

A handwritten signature in dark ink, appearing to read "James R. Posynick", written on a light blue background.

James R. Posynick
Adjudicator