



CASTING THE NET

A Review of Ontario Provincial Police Practices for DNA Canvasses

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Gerry McNeilly
Independent Police Review Director



CHAPTER ONE

Overview

Bayham is a rural municipality in southwestern Ontario. It lies south of Tillsonburg on the eastern edge of Elgin County. Roads trace a grid across orchards and farmland that extend down to Lake Erie.

Jane Doe¹ lived alone on one of those roads. Her house was surrounded by fields, orchards and a ravine that dipped deep into the landscape; across the road stood a forest. Her closest neighbour was 240 metres away, approximately one city block.

At about 9 p.m. on October 19, 2013, she stepped onto her porch to have a cigarette. It was a cool autumn evening, clear after the rain earlier in the day. She sat down on a lawn chair as she lit her cigarette.

Suddenly, a gloved hand grabbed her from

behind, covering her mouth. When she tried to stand up and turn toward her attacker, he spun her around and thrust a large knife in front of her face. She continued to struggle, putting her cigarette out on his chest. She was able to see that her attacker was a black man wearing a hoodie pulled low over his eyes. He pushed her and she fell backward, striking her head against the brick wall of the house. Then he threw her to the ground and dragged her into the house.

Inside, the attacker shoved Ms. Doe to the floor on her stomach. As she continued to struggle, he straddled her, pulled her head back, wrapped a cloth around her neck and started to strangle her. She was choking, so she told him she would stop fighting. He blindfolded her and tied her wrists. He told her he had come to

¹ There is a court-imposed publication ban to protect the victim's identity.

murder her, but instead was going to rape her. He then sexually assaulted her. He was in her home for about 45 minutes. Before leaving, he removed the original restraints from her wrists, gagged her and used rope to tie her hands and feet. He threatened to murder her if she called the police.

After Ms. Doe's attacker left, she was able to free herself from the restraints. She locked the front door, shut off the inside lights and sat on the floor. She was undoubtedly traumatized. Eventually, she telephoned a girlfriend, and then her ex-boyfriend. They came to the house and encouraged her to report the attack to the police.

The next afternoon, October 20, 2013, she reported the crime to the Ontario Provincial Police (OPP) over the phone. She provided a description of her attacker to the dispatcher: "I do know that he was one of the migrant workers they bring in to do the crops. He had a hoodie on pulled over his head. He had gloves on. ...I would not be able to identify him, no. ...I watch these guys go up and down my road all the time this time of year. I know it was one of them. He was a black guy. I'm not sure if they're from Jamaica. There was an accent for sure. I'm guessing Jamaican....I live here alone and I know the guy, he sees me all the time sitting on my front porch and he knows I'm here alone."

Constables Nelson and Snedden were dispatched to the victim's home. They were joined by Detective Constable Nolan, who was assigned as the primary investigator. Detective Staff Sergeant Raffay was the investigation's major case manager.

When the police arrived, Jane Doe again described her attacker. She told them that although she was blindfolded for much of the attack, she could still see from under the bottom of the blindfold. Her attacker was wearing a grey

hoodie pulled down over his eyes, blue-green gloves with a rubbery coating and dark cotton work pants. He was between 5'10" and 6' tall, muscular and possibly in his mid to late 20s. He was black, fairly dark, with no facial hair and had a low voice with a heavy accent, which she thought to be Jamaican.

An intensive search for Jane Doe's attacker followed. That search is documented in the Report that follows. Ultimately, the OPP arrested Henry Cooper, a migrant worker from Trinidad. He pleaded guilty to sexual assault with a weapon, forcible confinement and uttering death threats. He was sentenced to seven years in prison.

Although the police investigation resulted in the successful arrest and prosecution of Henry Cooper, questions were raised about how the investigation had been conducted. Police decided that DNA samples would be taken from each of the many migrant workers in the vicinity. This investigative tool is known in Canada as a "DNA canvass."² The fact that it targeted only migrant workers of colour raises important questions about whether the police were engaged in racial profiling, discriminatory practices and/or perpetuating stereotypes about the targeted community.

When the DNA canvass was being conducted, the police did not have reasonable grounds to believe that a particular migrant worker was the attacker. Accordingly, DNA samples could only be legally obtained directly from donors with their informed and voluntary consents. Important questions were raised about whether the consents obtained were truly informed and voluntary, particularly given the vulnerability of the migrant worker community. Concerns were also expressed about the retention and potential future use of DNA samples taken from workers who

² In the United States, it is more commonly referred to as a "DNA sweep." For convenience, I have used the term "DNA canvass or canvassing" throughout this Report, unless referring to the American experience.

had no connection to the crime. These and other concerns were reflected in the complaint filed with the Office of the Independent Police Director (OIPRD), and in submissions from various stakeholders in support of the complaint.

In my view, these important questions were best addressed through a systemic review of OPP policies, procedures, standards and practices for conducting DNA canvasses and obtaining DNA on consent from vulnerable groups during criminal investigations.³ Section 57 of the Police Services Act gives the Independent Police Review Director the power to examine and review issues of a systemic nature that may give rise to public complaints, and make recommendations to the Minister of Community Safety and Correctional Services (MCSCS), the Attorney General, chiefs of police, police services boards and any other body. A systemic review is not designed to find individual misconduct, but to identify and address larger issues of systemic importance.

In conducting this review, the OIPRD examined the public complaint that was filed and interviewed 10 officers involved in the investigation, as well as civilian witnesses, including 32 of the migrant workers. We reviewed officers' notes and statements, minutes of meetings, occurrence reports, audio and video recordings of interviews, completed consent forms and questionnaires, photographs, forensic evidence, OPP policies, procedures, practices and training materials. We requested and received extremely helpful submissions from stakeholders and members of the public. We examined relevant jurisprudence and literature from inside and outside Canada. We also conducted a roundtable to obtain feedback from a number of stakeholders on potential recommendations for change.

SUMMARY OF FINDINGS

For the reasons reflected in this Report, I am satisfied that the OPP investigation was not motivated by racial prejudice, as alleged in the complaint to the OIPRD.

The police were investigating a violent sex assault. A sexual predator remained at large. Based on the victim's description of her attacker, the frequent use of the road in front of her home by local migrant workers, and the demographics in this rural community, the police had ample grounds to believe that the perpetrator was one of the local migrant workers of colour. The attacker had potentially left his DNA at the scene of the crime. He had also brought items to the crime scene that might contain his DNA. There were significant time constraints on the investigation. The majority of the migrant workers were scheduled to leave Canada and return to their home countries in short order. Some had already departed. In the circumstances, the police decided that a DNA canvass of local migrant workers would be an important investigative tool. I take no issue with that decision. Indeed, the decision to conduct the DNA canvass enabled the police to focus on, and ultimately apprehend, the perpetrator.

However, the DNA canvass in this case was designed to obtain DNA from every migrant worker of colour, regardless of his age, height, weight, the presence or absence of facial hair or other defining characteristics. I recognize that, in some respects, Ms. Doe's description lacked detail. The composite drawing prepared by the police may or may not have closely resembled the attacker. As well, the inherent frailties of eyewitness descriptions meant that investigators could reasonably assume that features of Ms. Doe's description might not be accurate. That

³ The Terms of Reference are reproduced in Appendix A to this Report.

being said, the migrant workers were treated as potential persons of interest and asked to provide their DNA to the authorities when a number of them could not have met even the most generous interpretation of Ms. Doe's description.

Investigators maintained that the breadth of DNA canvassing was appropriate since the perpetrator left items (shoelaces and a strip of clothing) at the crime scene. These items might conceivably have been taken or borrowed by the perpetrator from other migrant workers, whose DNA on these items might have indirectly led to discovery of the perpetrator.

In my view, this rationale did not provide sufficient justification for the decision to seek DNA samples from every local migrant worker of colour, regardless of his physical characteristics. While I am satisfied that, in the particular circumstances of this case, the overly broad DNA canvassing was not based on stereotypical assumptions about migrant workers or persons of colour, it is perfectly understandable why it would have been perceived as such by members of the community and public interest organizations. Regardless of a lack of intent or motivation to discriminate, the nature and scope of the DNA canvassing could reasonably be expected to have an impact on the migrant workers' sense of vulnerability, lack of security and fairness. It could also send the wrong message to others in the local community about how migrant workers, as a group, should be regarded. Conversely, a more focused DNA canvass, together with additional measures discussed in this Report, could have alleviated or reduced concerns about racial profiling.

I also conclude that the investigation failed to recognize the particular vulnerabilities of the migrant worker community targeted by the DNA canvass and how those vulnerabilities were relevant to whether the consents obtained were

truly informed and voluntary. The role played by the farm owners and their staff also contributed to concerns about whether all of the consents obtained were truly voluntary. In fairness, the OPP took significant steps to attempt to ensure that consents were informed and voluntary. My recommendations address how the police can better recognize the particular vulnerabilities at play, so as to negate perceived and actual racial profiling or stereotypical thinking while not compromising the effectiveness of their investigations.

Finally, the authorities were obligated in law to destroy the DNA samples of individuals cleared in the investigation. The Centre of Forensic Sciences (CFS) and the OPP did this in a timely way. However, this will be news to a number of the migrant workers, who did not understand that their DNA samples would be or had been destroyed. I conclude that the OPP could have taken additional steps to explain the destruction process to individuals asked to provide DNA samples as well as the fact that their samples would not be used to investigate other crimes. Most importantly, it would have been preferable if the police had taken steps to notify the migrant workers in a timely way, to the extent practicable, that their DNA samples were about to be or had been destroyed.

The OPP has no specific policy that governs how and when DNA canvasses are to be conducted. In my view, such a policy should be created by the OPP and similarly situated police services in Ontario to identify and ensure best practices and compliance with the law. This Report provides guidance on the contents of such a policy. It also makes recommendations for best practices to be adopted to ensure that any future DNA canvasses do not result in a repetition of the concerns identified in this Report.

Policing relies heavily on public acceptance

and a shared commitment to justice. It is important that policing not only be free from racism, racial profiling, bias and discrimination, but be perceived as such by the community. This Report is designed to assist in achieving that goal.



CHAPTER TWO

The OPP Investigation

I have already described the initial OPP response to Jane Doe's report, and her description of the attacker to responding officers. This chapter outlines those steps subsequently taken in the investigation that are of importance to this review. It is not designed to capture everything that was done. A more detailed description of contentious features of the DNA canvass is best done as part of my analysis and findings in chapter five.

October 20, 2013

At 5:15 p.m. on October 20, 2013 (the same day the attack was reported), Constable Snedden escorted the victim and her friend, M.T., to a local hospital. Detective Constable Brown attended the hospital and while the victim was being examined, interviewed M.T. Detective Constable

Brown then escorted the victim and her friend to the Sexual Assault Centre at the St. Joseph's Health Centre in London. The staff conducted a medical examination, completed a Sexual Assault Examination Kit, and turned the kit over to Brown as evidence.

Meanwhile, Detective Constable Nolan canvassed the victim's neighbours and determined that they neither saw nor heard anything.

At 6:58 p.m. OPP Forensic Identification Service (FIS) officers attended at the home of the victim to take photographs and collect evidence.

At 9:15 p.m. Detective Constable Clarke interviewed the victim's ex-boyfriend. As noted previously, the victim had initially reported the attack to him and to her friend M.T.

October 21, 2013

At 8:41 a.m. OPP officers assigned to the case met to discuss the investigation. They decided to take a number of steps, including:

1. Searching the area around the victim's residence and continuing to interview the neighbours
2. Attending at Martin's Farm⁴, a nearby farm, to get a list of the workers and the kind of gloves they used
3. Submitting the laces and straps found at the scene to the CFS
4. Engaging the Major Case Management system and contacting the OPP Behavioural Sciences Division
5. Issuing a media alert
6. Attending at a bank in Tillsonburg to obtain a list of migrant workers who banked there
7. Checking area hospitals to see if anyone had attended for injuries
8. Checking taxi records
9. Conducting additional forensic examination of the stairway at the residence

At 11:25 a.m. Detective Constable Brown conducted a formal interview with Jane Doe. She elaborated on her previous description of her attacker and the events. She said this:

You could see because of the sentinel light. I kept trying to see and like he's in the shadows and of course he had his hoodie pulled down, but it didn't take me long to realize he was a black guy and then it occurred to me he's one of these guys I see go up and down this road every day. I even said that to him because I kept saying "Who are you? Who are you?" Then I had looked and I was facing him and

I said you're one of those guys I see up and down the road and that's when we tussled... and he kept trying to turn me away from him.

Jane Doe told Detective Constable Brown that she assumed the culprit kept trying to turn her around so she would not look at him. He also tied a cloth around her eyes. However, she was "peeking out from under the bandana."

In that interview, she provided the following description of the perpetrator:

- Black, fairly dark but not the darkest end of the spectrum, full lips, full nose
- No facial hair
- Mid to late 20s
- 5'10" to 6' tall
- Muscular
- Possibly right handed
- Very low, raspy voice with a heavy accent. She said she had trouble understanding him. It struck her as a Jamaican accent
- Wearing a grey hoodie, work-type cotton-like pants and white socks

In the interview, the victim was sure her attacker was a migrant worker. She saw migrant workers on the road in front of her house on many occasions. She said:

There's an apple orchard right next to my property and that's where they go in. When they go by there's guys that they'll wave and I wave back. Or in the evening you might see a couple of them on bicycles riding by in their free time and they might yell "Hi" and I'll say "Hi". That's the extent of the contact I've ever had with them.

⁴ All farm and bunkhouse names are taken from the OPP's Major Case Management files disclosed to the OIPRD. They do not necessarily reflect the precise corporate or legal names involved.

Martin's Farm has fields and orchards in the area, several of which are in close proximity to Ms. Doe's home. Martin's Farm also has several bunkhouses or residences where the migrant workers live. They, too, are not far from the victim's home. These residences include:

- Rosenberger House
- Pastor's House
- Wilk's House (it has two bunkhouses on the property)

There are several other farms in the area. They include:

- Manary Farm
- Crevits Farm
- Wizniak Farm
- Pihokker Farm

At 12:16 p.m. Detective Constable Wouters attended the Martin's Farm office and spoke with the owner, Leighton Martin, and the supervisor, John Banman. Wouters asked for a list of the migrant workers who were employed by Martin's Farm. Martin agreed to produce a list. That afternoon, Wouters received a sample of the gloves worn by the Martin's Farm workers. The particular sample was yellow and red, though another officer later observed blue and green gloves being used in the field.

At 1 p.m. an Emergency Response Team (ERT) was deployed to search for evidence in the immediate proximity of the victim's home. They found a blue glove approximately 15 metres into a cornfield behind the victim's residence, and turned it over to OPP FIS officers. Subsequently, police determined that the glove was not associated with the case. ERT also located a footwear impression approximately

100 metres into another cornfield next to the victim's residence. One of its officers estimated the impression to be that of a size nine man's shoe with no thread wear. An FIS officer photographed the impression and mapped its location.

Commencing at 1:30 p.m. Detective Constable Nolan interviewed several of the victim's neighbours. This yielded no additional information.

At 2:33 p.m. Detective Constable Nolan attended a bank in Tillsonburg, where he inquired whether the bank kept a master list of customers who were migrant workers. No such list existed.

At 4:20 p.m. Detective Sergeant Johnstone contacted composite artist Constable Zuidervliet to meet with Jane Doe to create a composite sketch of the suspect.

At 5:35 p.m. Detective Staff Sergeant Raffay, Detective Sergeant Johnstone, Detective Sergeant Gonneau and Inspector Peer met to discuss the direction of the investigation. Notes of that meeting reflect that:

1. The police needed to contact the Jamaican consulate to determine how many Jamaican workers were in the area.
2. All the items that had been seized by the FIS should be delivered to the CFS right away.
3. The police would get the names of the migrant workers from the farmers, interview them and seek to obtain their DNA on consent. This would be done on video (ultimately, it was audiotaped instead).
4. The DNA collection would begin with the bunkhouse closest to the victim's home, Rosenberger House, believed to house about 30 workers.
5. A search of articles belonging to the workers would also be done in an effort to find the hoodie worn by the perpetrator.

6. The investigation would be turned over to Detective Sergeant Johnstone, who was supervising the Elgin County OPP at the time. Detective Sergeant Gonneau was to assist in the DNA canvass.

Detective Staff Sergeant Raffay advised the OIPRD that it was his decision to collect DNA from the migrant workers. He explained that decision as follows:

Well, the victim had provided information that the suspect had brought with him several items including, I believe, two black shoelaces or dark-coloured shoelace material and another fabric that was a piece of material, I believe like a clothing or a shirt-type material, like a strip ripped off that. There was interaction between the suspect and the victim which would make you believe that there could be DNA on these items. The victim provided a description of the suspect and some information on the suspect and from that information, I learned that there were several farms in the area that housed, or that employed migrant workers and that it seemed like a logical step to canvass that area. And being that those...well, the individuals were going to be leaving in a short period of time, we had to gather what evidence we could and I thought it was a viable and a good investigative technique to do that.

At 6:01 p.m. a media release requesting the public's assistance in solving the crime was issued. It included the following description of the suspect:

- Black male
- 178cm (5'10") – 183cm (6') in height with a muscular build, no facial hair

- Mid to late 20s in age
- Suspect was wearing a grey hoodie, dark pants and white socks

At 6:12 p.m. Detective Sergeant Johnstone called Detective Constable Nolan to discuss taking statements and DNA swabs on consent from migrant workers. Nolan advised that workers would be leaving for their home countries in two weeks, giving them time to complete the canvassing. Johnstone instructed Nolan to arrange to question and take DNA consent samples the next day from the workers living and working on the farms closest to the victim's home.

At approximately 9 p.m. FIS officers completed their examination of the inside of the victim's home, which included taking photographs and swabbing for potential DNA. Detective Sergeant Johnstone authorized the release of the scene (that is, the residence) back to the victim.

October 22, 2013

At 8:15 a.m. Detective Constable Nolan directed Detective Constables Wouters and Vanbussel to meet with Mr. Martin, obtain a list of the names of the migrant workers who lived at the Rosenberger House and ascertain the addresses of the other bunkhouses as well as their distance from the home of the victim.

At 8:37 a.m. Detective Sergeant Johnstone advised Detective Constables Nolan and Chandelier to obtain a Consent to Provide Biological Samples form and to create a question sheet for interviewing the workers.

By 9 a.m. Detective Constable Nolan was able to compile a list of the three bunkhouses that were in closest proximity to the victim's home.

At approximately 9:30 a.m. Detective Constables Wouters and Vanbussel met with Mr. Martin and Mr. Banman. They received a list of 30 workers who lived at Rosenberger House

and 17 who lived at Pastor's House. They also learned that on the evening of the attack, there had been a party at one of the two Martin's Farm bunkhouses on the Wilk's House property. Some workers from other bunkhouses attended the party, which took place from 8:30 p.m. to 2 a.m.

At about 11 a.m. FIS Constable Bates consulted with a CFS biologist regarding the investigation. The OPP was requesting that the DNA to be submitted for examination be analyzed on an urgent basis. Later that afternoon, Bates drove to Toronto with the Sexual Assault Evaluation Kit and crime scene items, and submitted them to the CFS.

Meanwhile, Detective Constables Nolan and Chandelier worked to complete a draft questionnaire to be used when interviewing the workers. Detective Staff Sergeant Raffay approved the questionnaire at approximately

1:00 p.m. It was designed to capture personal information, including the worker's date of birth and physical description. It also contained questions as to what the worker knew about the incident, where he was at the relevant time, whether someone could confirm that, whether other occupants of his residence were in the residence at the relevant time and whether he had information that made him suspect anyone.

As indicated earlier, the OPP needed a Consent to Provide Biological Samples form for use when seeking samples of the workers' DNA. A FIS officer provided investigators with the most up-to-date consent form available. While the questionnaire was tailored to this specific investigation, the Consent to Provide Biological Samples was a template form issued by the Ministry of the Attorney General in 2005. It reads:

Consent to Provide Biological Samples

Police Service _____
Occurrence Number _____

Police Case ID _____

I, _____ have been advised by _____,
that I am being asked to voluntarily give a sample of my _____ to determine my
involvement, if any in the

I have been advised and I understand that the results of such on examination
may be given in evidence in any and all criminal proceedings against me. I
understand that the evidence may be used to prove I am guilty of an offence or to
prove that I am innocent of an offence.

I have been advised and understand that I have the right to retain and instruct
counsel without delay. I have the right to telephone any lawyer I wish and speak
to that lawyer in private. I also have the right to free advice from a legal aid
lawyer. I have been advised that the telephone number 1-800-265-0451 will put
me in contact with a Legal Aid Duty Counsel Lawyer for free, private legal advice
right now.

I have been told and understand any conversations I have had with any other
officers regarding this case are not to influence me in making a decision to
provide a biological sample.

I understand that this consent to take a biological sample will allow authorities to
conduct, or cause to be conducted, such analysis as deemed appropriate by
them and will include deoxyribonucleic acid (DNA) testing.

I acknowledge that I have not been pressured into providing this consent. I also
confirm that I have not been offered anything in exchange for providing this
consent.

In addition to the above, I have further been advised by _____
of the following in respect of giving a sample.

1. The purpose of obtaining a sample is to conduct a forensic analysis of that
sample and compare it to the items seized by the authorities in respect of
this investigation.
2. I understand that I am under no obligation to provide a sample.

Officer Initials _____ Person Providing Sample Initials _____

3. The Criminal Code says that samples of bodily substances voluntarily given shall be destroyed and electronic data related to those samples will be permanently removed once it is determined that the bodily substance does not match to the crime under investigation.
4. I further understand that once I have consented to this process, I may withdraw my consent up to the time this sample is taken.
5. This sampling will be done at _____ on _____.
6. That sampling will be conducted by _____, who is a person qualified to take samples of _____ for the purposes of forensic analysis.

I understand that this process will _____ audio and or video taped.

- I agree to provide this sample without calling any lawyer or anyone else.
- I have called a lawyer spoken to that lawyer in private and obtained all the advice I feel I need, I agree to provide this sample.
- I refuse to provide a biological sample.

My signature and initials indicate that I have read and understood the contents of this form.

Dated this ____ of _____, _____, at the _____ of _____, Ontario

Signature
(Person Providing Sample Signature)

Signature
(Person Witnessing Signature)

Signature
(Interpreter's Signature)

Officer Initials _____ Person Providing Sample Initials _____
Page 2 of 2

At about 2:30 p.m. Detective Constables Nolan, Chandelier, Wouters and Vanbussel, along with FIS Constable Sandhu, attended a Martin's Farm apple orchard. The officers arrived in two unmarked police cars and the FIS officer brought the forensic van. Farm owner Leighton Martin brought the workers out of the fields, three or four at a time. The workers waited in Martin's car until the officers were ready for them. The officers came to his car and escorted the workers to individual police cars. The interviews and requests for DNA samples took place inside the police cars. The DNA consent form was read out to the workers, who confirmed their consent by signing the form. This was audiotaped. (I will elaborate on what was and was not audiotaped later in this Report.) If the workers consented to providing a DNA sample, they were escorted to the forensic van, where buccal swabs were taken. (Buccal swabs or smears refer to taking cells from the inside of the cheek.)

At 3:04 p.m. the officers went to another nearby orchard to continue their questioning and to obtain samples of the workers' DNA. Mr. Martin was again present at the orchard.

During the canvass, Mr. Martin advised the officers that he had previously confirmed with the workers who resided at Pastor's House that all of them, with one exception, were either in their residence or at the Wilk's House party on the evening of October 19. He advised the officers that the absent worker was now working in the orchard. That worker was subsequently interviewed by police and consented to provide a DNA sample.

By 6 p.m. the police had interviewed and collected DNA samples from 16 workers who were working in the orchard. All of the workers who were canvassed consented to provide their DNA.

Arrangements were then made with Mr. Martin

for the police to attend Rosenberger House the following morning at 6 a.m. to obtain samples from the remaining residents who were working at other orchards.

At 6:50 p.m. the police held a case conference meeting at the St. Thomas detachment. The following information was generated at that meeting:

1. Detective Constables Wouters and Vanbussel had obtained a list of the migrant workers who worked for Martin's Farm and the bunkhouse where each one was living that week.
2. The police had identified four Martin's Farm bunkhouses (described earlier).
3. Every worker canvassed to date had signed the consent form and provided a sample of his DNA.
4. Detective Constables Nolan and Chandelier indicated that none of the workers canvassed that day matched the description of the suspect or raised any concerns.
5. Detective Constable Nolan had observed the gloves worn by the workers in the orchard. They had a greenish-blue colour. A sample glove was obtained for reference purposes only.
6. FIS Constable Bates reported that the CFS would not have any results available for two weeks.

October 23, 2013

At about 6 a.m. five officers under the direction of Detective Constable Nolan and FIS Constable Bates met at Rosenberger House, where they continued to interview workers and collect DNA samples from them. The officers again arrived in unmarked police cars and the forensic van. According to John Banman, the supervisor, he stood by the bunkhouse and helped to organize and guide the workers to the police cars. The interviews and requests for DNA samples took

place inside the cars. Again, police audiotaped the consents given. After the workers consented to provide a DNA sample, they were escorted to the forensic van, where the buccal swabs were taken.

Several residents from Pastor's House were also present at Rosenberger House, having arrived on the bus that was transporting them to work. They, too, were interviewed and asked to provide a sample of DNA. Twenty-three of the 24 workers interviewed provided DNA samples. One worker did not consent.

At about 8:50 a.m. the officers attended Pastor's House, where they interviewed the remaining seven workers at that residence. All seven workers consented to provide a DNA sample.

That same morning, Detective Sergeant Raffay contacted the CFS both by email and telephone, requesting that it expedite its examinations. He was advised that the best turnaround time would be two weeks, and that the police should submit the anticipated comparison samples (that is, the samples obtained from workers) as soon as they received them, rather than awaiting the results of the crime scene samples.

That afternoon, Detective Constable Wouters spoke with John Banman, who provided the names of the liaison officers from the Seasonal Agricultural Worker Program (SAWP) that Martin's Farm used as contacts for Jamaica and Trinidad. Banman also confirmed that officers could attend Wilk's House at 6:30 p.m. the following day to interview the workers who lived there and request their DNA.

Detective Constable Wouters called the East Caribbean Liaison Officer and left a voice message that he wished to obtain the number of farms in Bayham with migrant workers and the number of those workers.

As had previously been arranged, Constable Zuidervliet, the composite artist, met with Jane Doe and completed a sketch based on her description of the suspect. The composite was submitted to investigators.

October 24, 2013

At 5 p.m. officers followed up on a report that a man had found a knife in a field near the victim's residence while walking his dog. Police took a statement from the witness and the knife was seized as potential evidence.

At about 6 p.m. Detective Constable Nolan and FIS Constable Bates briefed 10 officers at the Vienna Community Centre on the canvassing to be done that day, and the use of the questionnaire and the Consent to Provide Biological Samples form. Detective Sergeant Gonneau was also in attendance.

At about 6:30 p.m. the officers, under the supervision of Detective Sergeant Gonneau, arrived at Wilk's House where they interviewed 34 workers. Thirty-three provided DNA samples. One individual refused, citing religious reasons. The police interview form described him as "East Indian."

The OPP were advised that two other residents of Wilk's House were working at the Martin's Farm cold storage facility. Officers attended at that location, interviewed the two workers and obtained samples of their DNA.

By 9 p.m. officers had interviewed 36 workers, taking 35 DNA samples on consent.

October 25, 2013

That morning, FIS Constable Bates prepared the collected DNA swabs for the CFS. They were submitted later that day.

At 11:35 a.m. Detective Constables Nolan and Chandelier attended at another nearby farm, Manary Farm. They spoke with the owner, Kathy

Manary, who advised that she employed nine workers, seven from the Eastern Caribbean and two from Trinidad. Two others had already left Canada and returned home earlier in October. Manary did not employ any Jamaican workers.

Manary was shown the composite drawing of the suspect. She indicated that it resembled one of her employees, who had been AWOL (absent without leave) since September. Manary agreed to arrange a time for the police to canvass her employees. She also advised the police that there were several other farms in the immediate area that employed migrant workers, including the Crevits Farm across the road.

At 12:10 p.m. Nolan and Chandelier attended the Crevits Farm, but no one was present. They then attended the Wizniak Farm, and spoke with its owner, John Wizniak. He confirmed that on October 19, he employed six workers from Jamaica. One left Canada on October 22, but five remained. Wizniak was shown the composite of the suspect. He indicated that it did not resemble any of his workers, including the worker who had just left. However, he agreed to arrange a time for the police to re-attend and canvass the workers.

At 12:37 p.m. Nolan and Chandelier arrived at the Pihokker Farm, and spoke with its owner Frank Pihokker. He advised that he currently employed four workers. One other worker went AWOL two weeks prior. Mr. Pihokker was shown the composite sketch of the suspect. He did not feel that it resembled any of his workers. Pihokker was advised that he would be contacted to arrange a time for his employees to be canvassed.

October 28, 2013

Commencing at about 9 a.m. Detective Constables Wouters and Vanbussel questioned workers employed at the Manary, Wizniak and

Pihokker Farms. FIS Constable Bates collected the DNA samples. In total, 17 workers were interviewed (nine at Manary, four at Wizniak and four at Pihokker). Fifteen provided DNA samples. Two workers from Manary Farm refused to provide samples. Both were described as “East Indian.”

October 30, 2013

At 11:15 a.m. Detective Staff Sergeant Raffay, Detective Constables Caslick, Chandelier, Nolan, Vanbussel and Wouters, along with Inspector Fishleigh, the Elgin County OPP detachment commander, met for a case management meeting. Nolan reported that Crevits Farm employed 14 migrant workers that year. On the night of October 19, a harvest party was held at the farm. The owners and all workers were at the party; however, two workers went to London at some point in the evening. All workers left Canada on October 22.

The officers discussed “how far out to go on the farm canvassing,” given that “[t]here is no reason for people to travel on the road...only the migrant workers travel this road to get to the fields.” The investigators also discussed how to properly record the DNA samples obtained from the migrant workers. They decided that this information would be captured on a spreadsheet. They also decided to obtain a DNA sample from the victim’s ex-boyfriend, “for elimination purposes.”

October 31, 2013 – November 12, 2013

Between October 31 and November 12, 2013, the pace of the investigation slowed somewhat. Composite artist Constable Zuidervliet again met with the victim to complete a sketch of the knife she had been threatened with. The knife found in the field was similar to the one she described. Accordingly, the knife was swabbed and the sample sent to the CFS for testing.

On November 5, 2013, the CFS reported that they had obtained a male DNA profile from the items seized at the victim's residence and from the victim's Sex Assault Examination Kit. The DNA profile from both locations "could not be excluded as coming from the same source."

On November 8, 2013, the CFS reported that all of the DNA samples from the buccal swabs were excluded as the source of the previously reported male DNA profile. In other words, all of the migrant workers who had provided DNA samples to that point could not have been the source of the DNA found at the crime scene.

On November 11, 2013, FIS Constable Bates collected a DNA sample from the victim's ex-boyfriend. Bates submitted it to the CFS on November 13.

November 13, 2013

Detective Staff Sergeant Raffay, Detective Sergeant Johnstone, Detective Constables Caslick, Chandelier and Nolan and FIS Constable Bates met for a case management meeting. They discussed the CFS findings. During the meeting, they contacted the CFS to learn that additional tests were available which could provide an analysis of ancestral DNA markers for racial origin, but that such tests were only conducted by private companies. The officers asked whether Jamaica had a national DNA data bank. In a follow-up call, the CFS confirmed that it did. The CFS assisted with preparing a request to Interpol. It stated:

On October 19, 2013, an unknown black male with a Caribbean accent attended a residence in the Municipality of Bayham, Ontario, Canada. The male suspect accosted the female at knifepoint, forced her inside the residence where he sexually assaulted her. The victim has identified the suspect as

possibly being a Jamaican off-shore worker. A large number of off-shore workers are employed locally from Jamaica and many have recently returned home.

The police investigation has generated a strong suspect DNA profile.

We are requesting that our suspect's DNA profile be searched against your DNA database as this would greatly assist our investigation.

At the case management meeting, Detective Constable Nolan was assigned to obtain a list of all migrant workers in the Municipality of Bayham, Malahide Township, which is just west of Bayham, and in the west end of Norfolk County, which is just to the east of Bayham. He was also assigned to determine how many workers went AWOL during the season, reconsider the workers at Crevits Farm who had returned to their home country, and go back to canvass the farms to determine which migrant workers were at the Wilk's House party on October 19.

November 14, 2013

Detective Constables Nolan and Chandelier attended Crevits Farm. They were advised that the farm employed 14 workers that year – all Jamaicans. The workers frequently travelled the road where the victim lived to get to the fields, but were usually driven by truck. Most workers did not leave the property except to buy groceries in town on Friday nights. On the evening of October 19, the workers and the farmer's family had dinner and a harvest party. The farmer took photographs during both events. The officers viewed the photographs. All but two of the workers were present throughout the dinner and party, which extended past 10 p.m. The two exceptions were

picked up by friends around 8 p.m. The farmer's family went to their own house at 10 p.m. After that, some of the workers went to the party at Wilk's House, across the road from Crevits Farm. The two workers who left with friends returned to Crevits Farm on October 22. All the workers returned to Jamaica that day.

That same day, Martin's Farm provided the OPP with an additional list of its employees – a master payroll list. Detective Constable Nolan determined that 54 workers on that list had not yet been canvassed.

November 15, 2013

Detective Constables Nolan and Chandelier returned to Martin's Farm and spoke to the supervisor, John Banman, and another employee, Johan Knelsen. The 54 names were cross-referenced with the names of workers who were transferred from two farms in neighbouring Norfolk County. Fifty-two of the workers who had been missed were from those farms. Knelsen advised that he drove them in every day and returned them home at the end of every day. They did not attend the party at Wilk's House on October 19. In light of that evidence, the officers did not canvass these workers. The remaining two names were Henry Cooper (who turned out to be the perpetrator) and J.R. J.R. had returned home the previous Wednesday.⁵ Knelsen was not sure, at that time, whether Cooper had already left Canada.

November 17, 2013

Detective Constable Nolan contacted John Banman to find out whether Henry Cooper was still in Canada, and learned that Cooper was still at Wilk's House, but was scheduled to leave the following week.

At about 1 p.m. Detective Constables Nolan and Chandelier attended Wilk's House to speak with Cooper. Nolan told him that he had been missed during the canvassing. They wanted to speak with him privately. Cooper sat in the back of the unmarked police cruiser. Nolan asked Cooper if he would be willing to provide a consent DNA sample. Cooper advised that he had provided a sample at Rosenberger House, but had not filled out the interview questionnaire. Nolan conceded that the paperwork may have been misplaced, so Chandelier began to go through the questionnaire with Cooper. When asked if he had any suspicions regarding the attack on the victim, Cooper stated that he overheard a conversation between some workers at Wilk's House. He claimed that a male who had since left Canada was talking about a "white lady" to someone and that the conversation ended when Cooper approached.

After the questionnaire was completed, Nolan read the Consent to Provide Biological Samples form to Cooper and asked if he would provide a sample. Cooper said that the last time he gave a DNA sample in Trinidad, his mouth swelled. He reiterated that he had given a DNA sample when canvassed at Rosenberger House, but that he did not do the paperwork beforehand. He was told that no samples would have been taken without the required consent forms.

Detective Constable Nolan telephoned FIS Constable Bates, who confirmed that Cooper had not provided a DNA sample. Chandelier asked Cooper why he had not participated when the police attended Rosenberger House. He claimed he was sick upstairs. Nolan asked him again if he wanted to provide a sample. Cooper stated that he was aware that other workers had not provided samples. The officers confirmed that this was

⁵ According to FIS Constable Bates' notes and other records disclosed to the OIPRD, J.R. had, in fact, given a DNA sample on October 24, 2013. The OIPRD was unable to locate J.R.'s questionnaire or DNA consent form in the records provided.

true and that the exercise was totally voluntary. Cooper then said, "No."

Chandelier noted that Cooper was a black male, 5'9" to 5'10", with a thick accent, a thin, but athletic build, short black hair and brown eyes, with a growth of beard and a moustache. Chandelier asked Cooper about his facial hair. He said that he shaved it off periodically. He claimed that he last shaved three months ago. He then left the cruiser.

After this encounter, Nolan sent an email to Detective Staff Sergeant Raffay outlining his concerns about Cooper and suggesting that they attempt to obtain Cooper's discarded DNA. This would involve placing Cooper under surveillance to see if he discarded something that might contain his DNA. Raffay advised him to complete a "surveillance package" for discarded DNA.

November 18, 2013

On November 18, 2013, Detective Staff Sergeant Raffay contacted the CFS to explore the possibility of using DNA provided by Cooper's brother, another migrant worker, to do a familial comparison. Subsequently, Raffay obtained advice from a local Crown Attorney that the brother's sample could not be used for anything other than to determine his own involvement or lack thereof in the crime.

November 20, 2013

Commencing on November 20, 2013, Detective Staff Sergeant Raffay assigned officers to conduct surveillance of Henry Cooper.

November 22, 2013

At 3:29 p.m. Detective Constable Nolan received a telephone call from Mr. Martin, the owner of Martin's Farm. Martin described a conversation he had with Henry Cooper. He had explained to Cooper that not cooperating and not providing

DNA raised questions about his involvement in the matter. Martin stated that Cooper said his reason for not providing DNA was that his parents were recently deceased. (Martin knew they were, in fact, alive.) Cooper said he would give DNA when he was back in Trinidad. Martin told him that he would have to do it in Canada. Cooper then told Martin that he would do it next year. Martin told him that it would have to be now and that if he refused to take the test, he would not be invited back the following year. Martin asked Cooper when he started to grow a beard. Cooper responded that he had done so when it was getting cold and that he did not have one on the night of the party. Martin gave Cooper time to think about providing DNA. Cooper later confirmed his earlier decision not to provide DNA.

Martin was interviewed twice by the OIPRD. He advised the OIPRD that he learned that Cooper had not provided a sample of his DNA from the police. No officer confirmed that he had conveyed this information to Martin. Detective Constable Nolan said this to the OIPRD:

Leighton Martin gave me a phone call.... It was Friday the 22nd of November, 2013. I received a phone call from Mr. Leighton [sic] [at] 15:29 hours. So it was 3:29 p.m. and he informed me of his phone conversation that he had with Mr. Cooper and it had all to do with him not providing DNA and on and on and how he pressured him into trying to get this DNA before he went back home and at that point I told him to write that letter... To capture everything that he had said to him in that phone conversation. And then later on I went and picked that letter up.

I mean we have been doing this process since October 23, 22, somewhere around there. So he knew and I don't know how or whether

he got that from police or whether he got that from other workers, I don't know.

(Emphasis added)

Regardless of how Martin came into possession of this information, he was adamant in his interviews with the OIPRD that he never received any instructions from the police as to what he should say to Cooper.

Martin's initial written statement to the OPP illuminated his approach, as employer, to those workers who refused to provide a DNA sample. He said this:

When I was informed that three of our offshore workers had refused to take a DNA test regarding the tragic occurrence of a man (who fits the physical description of a number of our workers) [who] violated a woman in her home ... I made the decision that none of these men would be invited back to work for our company in the future unless they consented to take a DNA test as had been asked by the investigating police force.

He expanded on his approach when interviewed by the OIPRD:

Most of the workers had already gone home, but we had jobs to finish up, we gave Henry [Cooper] the opportunity to stay on. At this stage I found out that he, along with one other, who had gone back at that point, refused to take the test. The police had informed us of this at this stage. I appealed to him, I said this places a question on your name; it places a question on the program. You know we can't force you to take the test. It is voluntary, but it will certainly help to clear your name. I'll give you this incentive: you take this test and even though you're not quite in line, your work

record is good; we'll put you on the long term next year if you agree to take this test. This raised suspicion when he turned that down flat because long term is very special to them.

Martin's approach with Cooper stands in stark contrast with what the officers told the workers. All of the officers interviewed by the OIPRD indicated that they unequivocally conveyed to the workers that consent was voluntary and their decision whether to provide DNA would not affect their employment or have adverse repercussions because it was confidential. For example, Detective Constable Chandelier told the OIPRD:

We made it very clear... that this is voluntary and that we were not going to even tell their employers whether they gave DNA or not, and it would have no bearing on them coming back. We did have some concerns raised, but we would say this is a voluntary thing. It's got nothing to do with your employment. We won't be telling people that you gave or didn't give a sample and it's not going to affect your status here. I don't recall anyone giving names of people that did not provide. There might have been some discussion that some people did refuse which they did, but I don't believe that they were ever identified.

Detective Constable Wouters said this:

We explained to them that they are under no obligation to provide this and this will not affect their employment because that was already told to us by Martin's Farm for sure – John Banman, in conversation with Mr. Martin. That was discussed between them because I'm sure some of their employees went to them and said well, if we don't cooperate with the police, what's going to happen to

us? And we wanted it to be known that this was completely voluntary. And Mr. Martin or Mr. Banman said this will not affect their employment. And it can't.

The recorded interviews with migrant workers confirmed that this was the type of information communicated by police to the workers. I will discuss the implications of the difference between Mr. Martin's expressed approach and what the police told workers in chapter five. The presence and involvement of management when workers were directed to police cars for questioning and to the forensic van, if they consented to provide DNA samples, also made it difficult, if not impossible, for the workers to refuse to provide DNA samples without management's knowledge.

On November 22, 2013, between 6:40 and 7:12 p.m., surveillance officers seized a cigarette butt, pop can, pizza slice tray and napkin that were discarded by Cooper. Those items were sealed and delivered to the CFS for testing.

November 28, 2013

The CFS advised the OPP that the discarded DNA gathered during Cooper's surveillance was a "hit"; that is, Cooper could not be excluded as the source of the male DNA profile taken from the victim and the crime scene. The probability that a randomly selected individual unrelated to Cooper would coincidentally share the same DNA profile was estimated to be 1 in 5.6 quadrillion.

November 30, 2013

Cooper was arrested and detained in custody.

December 1, 2013

Detective Constable Nolan attended Rosenberger House to speak to the remaining migrant workers. He advised them that Henry Cooper was arrested for the sexual assault, the police were sure he

did it and he would be held in custody. Nolan thanked the workers for their cooperation and took questions. One worker asked if police were absolutely sure Cooper did it since he didn't give DNA. Nolan replied that "we can put Cooper in the house."

December 13, 2013

Officers executed a DNA warrant on Cooper. He exercised his right to counsel before a DNA sample was obtained through a finger prick. That DNA later proved to match the DNA found at Jane Doe's residence. As previously indicated, Cooper ultimately entered a guilty plea to three charges and was sentenced to seven years in prison.



CHAPTER THREE

The Complaint and Stakeholders' Submissions

THE COMPLAINT

In December 2013, the OIPRD received a complaint from Justicia for Migrant Workers making a number of allegations about the investigation conducted by the OPP in this case, including the following:

1. That Elgin County OPP conducted the DNA “sweep” in a manner that racially profiled the affected migrant workers
2. That the Elgin County OPP officers were motivated in whole or in part by racial prejudice toward the migrant workers because of the colour of their skin
3. That the Elgin County OPP engaged in racial profiling by targeting workers solely based on the colour of their skin, despite the fact that police had specific details about the suspect that should have narrowed the scope of the investigation (i.e., height, age and physical appearance). All black and brown migrant workers were approached during the DNA “sweep” and workers who did not fit the description of the suspect in any way apart from the colour of their skin were included in the “sweep” and asked to provide a DNA sample
4. That the OPP responsible for the investigation considered all black and brown males within its jurisdiction to be suspects in the sexual assault
5. That as a result of racial profiling, migrant workers felt they had to comply with police requests or they would appear guilty; they also had doubts about whether their DNA would be destroyed

6. That by engaging in racial profiling and discrimination against the migrant workers, the Elgin County OPP denied these workers their right to be equal under the law, contrary to s. 15 of the Canadian Charter of Rights and Freedoms (the Charter)
7. That by detaining migrant workers in a police cruiser prior to seeking their consent to DNA testing, did arbitrarily detain them, contrary to s. 9 of the Charter

Some or all of these concerns were echoed and expanded upon by a number of other stakeholders who made submissions to the OIPRD. These included the African Canadian Legal Clinic, the Canadian Civil Liberties Association, the Law Union of Ontario, Migrant Workers Alliance for Change, No One is Illegal, the Ontario Human Rights Commission, Justicia for Migrant Workers and the Toronto Police Accountability Coalition. Letters in support of the complaint were also filed by the Chinese Canadian National Council (Toronto Chapter), the Halifax Friends Meeting – Quakers, and the Metro Toronto Chinese and Southeast Asian Legal Clinic.

INITIAL SUBMISSIONS

A brief summary of stakeholders' submissions received after the announcement of this systemic review follows.

Justicia for Migrant Workers (J4MW) describes itself as a grassroots advocacy group based in Toronto, Vancouver and Mexico City. It works with migrant workers to advocate for changes to improve their living and working conditions while they are employed in Canada. It is comprised of migrant workers, academic scholars, and community and labour activists.

J4MW described the “structural vulnerability” of migrant workers to racism, racial profiling and racialized policing in Canada. It contended that “an unhealthy and problematic, informal relationship exists between the OPP and local police forces and employers with respect to dealings with migrant workers” that extends beyond this investigation. It was also concerned with the cooperation between the OPP and Canada Border Services Agency (CBSA) and how this could perpetuate the vulnerability of migrant workers.

J4MW recommended that first, the OIPRD push Ontario police services to adopt a “Don’t Ask, Don’t Tell” policy regarding immigration status. It maintained that police services should refrain from questioning people regarding their immigration status and also discontinue all support of CBSA investigations into migrant workers in the province. Second, it asked that the OIPRD collect, compile and release all data on migrant workers who have come into contact with police forces and the criminal justice system and push police forces to collect and disclose such data. Third, it urged the OIPRD to “force the police in Ontario to adopt and adhere to explicit policies on dealing with migrant workers during complaints and criminal investigations. These policies must ensure the Charter rights of migrant workers are protected.”

The Ontario Human Rights Commission (OHRC)

is a provincial statutory agency responsible for promoting and advancing human rights, and preventing discrimination in Ontario.

Its submission focused on the Ontario Human Rights Code. The Code prohibits discrimination based on personal characteristics (grounds) including “citizenship, race, place of origin, ethnic origin, colour, ancestry, disability, age, creed, sex, family status, marital status, sexual orientation,

gender identity and gender expression.” The Code protects against both direct discrimination and adverse effect discrimination (whereby policies and rules appear to be neutral but have an adverse effect on some people based upon one of the Code grounds).

The OHRC’s submissions defined racial profiling as “any action undertaken for reasons of safety, security or public protection that relies on stereotypes about race, colour, ethnicity, ancestry, religion or place of origin – rather than on reasonable suspicion – to single out an individual for greater scrutiny or different treatment.” The OHRC submitted that racial profiling is a systemic problem, which is not limited to initial interactions between police and individuals, but is a concern throughout an investigation. The OHRC stated that racial profiling has harmful individual and societal effects, listing various characteristics of racial profiling in policing. It shared the concerns about the OPP DNA canvassing identified by J4MW, and felt that the OPP collected DNA samples from the migrant workers in a manner consistent with racial profiling.

The OHRC made the following recommendations:

1. **Developing policies and procedures:** The OPP should develop and implement distinct policies and procedures that clearly prohibit racial profiling. It suggested key elements in the policies such as a clear definition of racism and racial profiling and examples of how racial profiling manifests in police activities like pedestrian and traffic stops, consent searches, investigative detentions, suspect selection and DNA sampling. The policies should also be developed in consultation with racialized groups and Aboriginal Peoples.
2. **Training:** The OHRC recommended training on racial profiling for new recruits, current officers, investigators and supervisors. The training would address issues such as the importance of good community relations, the nature of racism and its impact on Black and Aboriginal communities and discuss how racial profiling violates the Code, Charter, Police Services Act, and police policies and procedures.
3. **Data Collection:** The OHRC recommended that the OPP collect race-based data on police stops, searches and DNA sampling practices to identify, monitor, evaluate and reduce racial profiling. This data collection should be supplemented by qualitative research methods, such as focus groups. Racialized groups and Aboriginal Peoples should be consulted about the purpose, use, benefits and methods of collecting data. This data should be analyzed and interpreted and results should be made public.
4. **Recruiting, selecting, promoting and retaining a diverse workforce:** The OPP should seek to include racialized groups, Aboriginal communities and other under-represented groups to reflect the population it serves.
5. **The Ontario Ministry of Community Safety and Correctional Services (MCSCS) should provide direction to the OPP on all the recommendations outlined above as they are responsible for the Policing Standards Manual, which sets out standards for Ontario police services and offers recommendations for local policies, procedures and programs.**

The Canadian Civil Liberties Association (CCLA) is a national, non-partisan, non-governmental and non-profit organization that has been at the forefront of protecting fundamental freedoms and democratic life in Canada since 1964.

The CCLA submitted that the practice of “voluntary” DNA canvasses that target a large number of people is “inherently coercive,” particularly in the context of migrant workers who are detained and “asked” to provide samples at their workplace. Where consent is not truly voluntary, warrantless DNA collection tactics will violate Charter rights. The CCLA believed, based on the complaint and its understanding of OPP policies, that individuals’ section 8 Charter rights were violated in this instance. Further, it said that the targeting of a vulnerable, marginalized group in a manner that violates their s. 8 Charter rights doubly victimizes the targeted individuals and represents a particularly serious infringement of privacy rights and the right to be free from discrimination.

The CCLA described the unique vulnerability of migrant workers both as agricultural workers who are heavily dependent upon their employers and as temporary foreign workers who labour under poor work conditions and are vulnerable to abuse. The CCLA highlighted the problems migrant workers may have in advocating for themselves and asserting their rights, including fear of reprisals and deportation, language barriers, lack of knowledge of their rights and misleading information provided by their employers. Their work permits allow them to only work for one employer and often they are dependent upon their employer for housing.

The CCLA submitted that the Elgin County OPP engaged in racial profiling when they singled out a group based on their race and immigration status to the exclusion of factors that were actually relevant, such as matching the suspect description.

The CCLA discussed the legal framework for DNA collection and retention policies. Since DNA contains some of the most personal and private information about an individual, there must be sufficient oversight, control and scrutiny of procedures for collecting samples.

The CCLA observed that the criteria for assessing the voluntariness of consent has been well laid out by the Court of Appeal for Ontario and that the OPP must abide by existing jurisprudence. In its view, it is inherently coercive to “ask” innocent people to hand their DNA to the state, particularly when the police reinforce the “moral obligation” to do so. Absent a safeguard such as judicial authorization, the CCLA was concerned about the validity of consent in the context of DNA canvassing. This particular incident also involved asking for consent at the migrant workers’ place of employment and thereby brought another element of coercion into play.

It observed that while voluntary DNA samples are legislatively mandated in the Criminal Code to be destroyed if they do not match crime scene DNA, no such protection exists for discarded samples.

The CCLA’s recommendations included the following:

1. Best practices would require that, barring exigent circumstances, judicial authorization be obtained prior to engaging in DNA canvassing.
2. At a minimum, written guidelines should exist for DNA canvassing. These should be publicly accessible.
3. Police should make no statements to an individual asked to provide a DNA sample that he or she has a legal or moral obligation to consent.
4. Requests for DNA should be in as private a setting as possible.
5. Given the vulnerability of migrant workers, police should consult with them and their advocates regarding best practices to investigate members of their group.
6. With particularly vulnerable groups, police should be assisting with access to free and private legal advice to ensure they understand their rights.

7. The “Local Discard Index” for DNA should be destroyed.
8. DNA canvassing should never be done in a manner that constitutes illegal and unconstitutional discrimination under the Charter and the Ontario Human Rights Code.

The Toronto Police Accountability Coalition (TPAC) indicated that it has worked over the last 14 years to encourage debate about police policy issues and to make the police more accountable to the public.

The TPAC strongly supported J4MW’s submissions. It felt that my terms of reference do not go far enough and need to address the subject of the complaint, that is, “the unequal and discriminatory policing of migrant farmworkers.” Some of its recommendations raise important issues, albeit well outside the scope of my current mandate: for example, discrimination faced by women and LGBTQ migrant workers in their interactions with the OPP.

No One is Illegal Toronto (NOII-TO) is a network of migrant-led grassroots organizations spanning from Halifax to Vancouver (Coast Salish Territories) which is loosely affiliated with the global “No Person Is Illegal” movement.

It submitted that any policy which allows for “voluntary” DNA sampling will disproportionately affect non-status and migrant worker people, who are overrepresented in racially profiled communities and who are at a particular disadvantage to assert their legal right to decline sampling. It proposed that any OIPRD recommendation that allows for continued “voluntary” DNA sampling must also provide safeguards which account for the unique situation of non-status and migrant worker communities.

It cautioned me not to focus solely on the racial dimensions in the OPP DNA canvassing,

but recognize other factors at play such as the immigration status of the migrant workers. It said that the relationship between non-status/migrant workers and police is characterized by mistrust and a fear that any contact with state authorities will lead to detention and deportation. Additionally, police cooperation with the CBSA and immigration enforcement is another complication that adds to the fear and mistrust non-status and migrant workers may have for the police.

NOII-TO suggested that there be a moratorium on all “voluntary” DNA sampling in Ontario, failing which, the OIPRD should reflect that consent needs to be unequivocal, active, informed and free. This requires the police to advise prior to asking for identification that the individual does not need to undergo sampling, is free to leave and does not need to answer any questions.

It also advocated that a “Don’t Ask, Don’t Tell” policy should be adopted by all police services in Ontario regarding immigration status. This would reduce confusion and ensure consent is full, free and informed.

The Migrant Workers Alliance for Change (MWAC) described itself as Canada’s largest coalition of migrant worker groups and community, labour, legal and faith-based allied organizations.

It said that I must consider the extreme vulnerability of workers that leaves them open to employer abuse, injury, detentions and deportations. It submitted that I must determine what steps would make the giving of consent by migrant workers to the collection of their DNA truly voluntary. It supported J4MW’s recommendations.

The African Canadian Legal Clinic (ACLC) is a not-for-profit organization and specialty clinic funded by Legal Aid Ontario that provides, among

other things, advice and representation to African Canadians on legal matters involving issues of systemic and institutional anti-Black racism and racial discrimination. The ACLC defined the term “African Canadian” as including, “any person of African ancestry, descent or heritage, who self-identifies as such, including indigenous Black Canadians, people whose ancestry is indigenous to the African continent, African Caribbean and Afro-Latin American peoples, and all individuals of the African Diaspora who are in Canada and their dependents, regardless of their immigration status.”

ACLC submitted that the OPP engaged in racial profiling. It observed, among other things, that racial profiling is contrary to the Police Services Act and amounts to “Discreditable Conduct.” It is also contrary to OPP Operational Policy regarding diversity and bias-free policing.

It focused on the exceptional vulnerability of migrant workers who have difficulty vindicating their rights. It said there is “mounting evidence that African Canadians face racial discrimination in the criminal justice system and are subject to higher levels of scrutiny.” It submitted that the perpetrators of racial profiling and their supervisors must be held accountable in accordance with section 80 of the PSA.

The ACLC recommended that the OPP immediately and finally destroy all DNA collected in the sweep and records except for the charged person, develop an Anti-Racial Profiling Operational Policy, retain a human rights expert to develop and provide training to all service members on the Anti-Racial Profiling Operational Policy, retain an anti-racism expert to review existing operational policies and procedures with respect to their impact on racialized groups, take into account complaints against police officers relating to racial profiling and discrimination in review and promotion assessments and collect

publicly accessible data disaggregated by race for all incidents involving the “voluntary” collection of DNA samples for a period of five years.

The Law Union of Ontario was founded in 1974 as a coalition of over 200 progressive lawyers, law students and legal workers. The Law Union provides for an alternative bar in Ontario which seeks to counter the traditional protections afforded by the legal system to social, political and economic privilege.

The Law Union’s Stop Racial Profiling Committee (LUO-SRP) saw many parallels between the practice of police carding and the OPP’s DNA sweep, in that both seem to be a manifestation of “intelligence-led” policing trumping the human rights, civil liberties, and dignity of members of the community. The Committee advocated for rights-first, dignity-centred policing.

It also contended that taking DNA samples that did not match the physical description of the suspect permitted the logical inference that it was done “in order to build a DNA bank of Black and Brown migrant workers that could help in solving past and future crimes.” It also contended that the sampling must have been based in part on racial profiling and “perhaps on the false stereotype that Black and Brown men have a greater propensity to commit crime.”

It urged me to investigate and issue a report in order to understand the purpose of the DNA sweep of persons that did not match the description of the suspect other than skin colour.

It submitted that the OIPRD “must identify exactly what kind of personal information was stored, how it was stored, whether any of that data was shared with government or law enforcement entities outside of the OPP and whether any of that data still exists in the OPP’s records or in any third party’s records. Steps

must then be taken to completely purge all of these records, with the exception of the personal information of the individual who was actually arrested for the assault.”

The Chinese Canadian National Council (Toronto Chapter) is a Chinese-Canadian community-based advocacy group in Toronto. It expressed similar concerns to those identified in other stakeholders’ submissions, in particular the “voluntary” nature of the DNA sampling.

The Halifax Friends Meeting – Quakers offered support to the complaint launched by J4MW and urged the OIPRD to undertake a review of the incident.

THE ROUNDTABLE AND SUBMISSIONS ON A DRAFT POLICY

In December 2015, the OIPRD invited a number of the above stakeholders, together with the Ontario Provincial Police, the Toronto Police Service, the Criminal Lawyers’ Association and the Ministry of the Attorney General, to a roundtable discussion that focused on several recommendations which might flow from our systemic review: most particularly, that the OPP and similarly situated police services adopt a policy on how and when DNA canvassing should take place. A Discussion Paper, which included a Draft Policy for consideration, was circulated in advance of the roundtable. It is Appendix B to this Report. I personally attended the roundtable, as did my counsel and staff who were engaged in the systemic review.

I followed the roundtable with an invitation to police services in Ontario, including two First Nations police services, to comment on the Draft Policy that had been circulated at the roundtable.

The Office of the Information and Privacy Commissioner of Ontario also provided helpful suggestions. We also obtained additional written feedback from roundtable participants. A full list of those who participated in the roundtable and/or made submissions is enclosed as Appendix C to this Report.

In chapter six, I recommend that police services adopt a Model Policy on DNA Canvassing that draws upon the earlier Draft Policy with modifications informed by the stakeholder submissions. In my view, the Model Policy is much improved as a result of their input. Rather than summarize the stakeholders’ submissions on the Draft Policy here, I do so in my commentary to the recommendations, where those submissions can be better understood.

FINAL OBSERVATIONS ON STAKEHOLDERS’ SUBMISSIONS

I am grateful to all of those who participated in the process. To state the obvious, I was unable to agree with everything that was said to me. Equally significant, I was of the view that a number of submissions urged me to make recommendations that fell outside my terms of reference or would have required me to address matters that are not the subject of the OIPRD’s systemic review. That being said, quite a few of the submissions shaped, in a significant way, the contents of this Report.

The Ontario Provincial Police, in one of its submissions, indicated that it preferred to know what the “findings” of my systemic review were, before commenting on the Draft Policy that was discussed at the roundtable. I understand what prompted this submission, since several stakeholders at the roundtable assumed that the OPP had engaged in racial discrimination

and/or racial profiling and predicated some of their comments on that assumption. The OPP would have preferred that I address whether that assumption was correct before it was called upon to provide a policy response – most particularly, to the Draft Policy on DNA canvassing.

Of course, many public inquiries and systemic reviews do not divide their processes into two parts in this way. It would have been inefficient and, in my view, counterproductive, to release separate reports on findings and policy recommendations. This is particularly so for a systemic review where the focus is on policy recommendations. It is doubly so when my recommendations are designed, in part, not only to prevent discriminatory practices or racial profiling, but also to avoid even the perception of discrimination or racial profiling.

In a systemic review, only those findings of fact that provide context to the recommendations need be made. As well, the goal of such a review is not to make findings of misconduct, but to evaluate, through a systemic lens, whether things could have been done differently, and make recommendations for improvement. Despite the OPP's reservations, its representatives nonetheless provided valuable input at the roundtable and afterwards, as did other police services that commented on the Draft Policy.



CHAPTER FOUR

Statutory and Historical Background to DNA Canvassing

An understanding of the historical use or misuse of DNA canvasses or sweeps and the scientific and legal framework within which they take place is essential. This understanding must extend to the use, retention and destruction of DNA samples obtained through DNA canvassing.

DNA TESTING

Deoxyribonucleic acid – DNA – is a molecule that contains a unique genetic code. It is found in virtually every tissue in the human body. The DNA in blood is the same as the DNA in skin cells, saliva, and the roots of hair. DNA is a powerful tool for identifying individuals. With the exception of identical twins, each person's DNA is unique.

With the advent of modern technology, DNA can be extracted from a small biological sample, such as a drop of blood or a swab of the inner cheek for buccal epithelial cells. The resulting sample can be analyzed, creating a DNA profile that may be used to identify a particular individual. A DNA profile, drawn from a known biological sample, can be compared to an unknown DNA profile drawn from a different biological sample. If the profiles “match,” the two samples come from the same person. If the profiles do not “match,” the samples come from different people.⁶ I use the term “match” advisedly since it is more accurate to say that the same source cannot be excluded for the two samples, although the odds of coincidence are sometimes expressed in astronomical terms, such as 1 in 5.4 quadrillion.

⁶ <http://www.rcmp-grc.gc.ca/nddb-bndg/index-accueil-eng.htm>

DNA evidence has revolutionized the way many crimes are investigated and prosecuted. The forensic use of DNA has not only led to the successful identification and prosecution of many dangerous criminals, it has served to exonerate people who were suspected of crimes or wrongly convicted. The importance of this forensic development to the administration of criminal justice cannot be overstated. At the same time, the profound implications on the privacy and security interests of an affected individual when government takes and uses DNA samples cannot be ignored. As the Supreme Court of Canada has observed, a proper balance between these competing interests must be achieved within our constitutional framework.⁷

COLLECTING DNA

Collecting evidence that might yield a perpetrator's DNA profile is obviously of importance in the investigation of serious crimes, particularly where the perpetrator's identity is otherwise unknown or in doubt. If a DNA profile is generated from the crime scene evidence, the profile may be loaded into the National DNA Data Bank or other DNA data banks for comparison purposes. If that profile is not found within the National DNA Data Bank, a police investigation may focus on obtaining DNA from persons of interest or suspects for comparison purposes. Where a "match" is obtained, it might constitute significant, sometimes overwhelming, evidence of guilt. The comparison may also eliminate persons of interest from suspicion and correspondingly narrow the pool of potential suspects.

Broadly speaking, there are three relevant ways that the police can legally attempt to obtain DNA from an individual for comparison purposes:

1. The police can seek judicial authorization, pursuant to s. 487.05(1) of the Criminal Code of Canada. If the application for judicial authorization is successful, a DNA warrant is issued. Given the intrusion on personal privacy associated with the seizure of bodily samples to obtain a DNA profile, the Criminal Code sets out very clear preconditions for the issuance of a DNA warrant. The judge or justice of the peace must be satisfied, based on evidence under oath, that there are reasonable grounds to believe that:
 - a. A designated offence under the Criminal Code has been committed
 - b. A bodily substance has been found or obtained at the place where the offence was committed, on or within the body of the victim or on anything worn or carried by the victim at the material time or on or within the body of any person or thing or at any place associated with the commission of the offence
 - c. A person was a party to the offence
 - d. A forensic DNA analysis of a bodily substance from the person will provide evidence about whether the bodily substance referred to in (b) was from that person
2. If the police cannot meet the preconditions set out in s. 487.05(1), they can **request** that an individual voluntarily provide them with a bodily sample to enable forensic DNA analysis to be done. However, due again to the intrusion on personal privacy associated with the taking of a bodily sample, the police must ensure that the sample is indeed provided voluntarily and not as a result of pressure or coercion. Put another way, a bodily sample may be lawfully taken by police when it is

⁷ *R. v. Rodgers*, [2006] 1 S.C.R. 554, 2006 SCC 15 at para. 4.

done pursuant to an informed and voluntary consent. Where a group of individuals is asked to provide bodily samples for forensic DNA analysis in circumstances where the police do not have reasonable grounds to believe that any particular individual within the group committed the offence being investigated, the preconditions set out in s. 487.05(1) cannot be fulfilled.

Hence, the lawfulness of the police conduct is dependent on whether informed and voluntary consent has been obtained. The investigative technique of seeking the consent of multiple individuals because one of them may be the perpetrator is generally referred to as a DNA canvass in Canada and a DNA sweep in the United States.

3. Absent judicial authorization or consent, the police may seek to extract a person's DNA profile from an item he or she has discarded. This is also referred to as "cast-off" DNA. As occurred here, the police may place a person of interest under surveillance, looking for an opportunity to seize discarded items such as cigarette butts, coffee cups, tissues, gum or uneaten food that can be tested for DNA. Jurisprudence generally supports the lawfulness of police obtaining discarded DNA without judicial authorization or consent based on the principle of abandonment.⁸ Simply put, an individual's rights in this area, articulated in s. 8 of the Charter, are tied to his or her reasonable expectation of privacy. Generally, it is said that an individual no longer has a reasonable expectation of privacy in items he or she has discarded.⁹

THE USE OF DNA CANVASSES AS AN INVESTIGATIVE TECHNIQUE

Police officers describe canvassing for voluntary DNA as an "investigative technique" that is available to them. This technique has several purposes. First, the police seek to identify, through forensic DNA analysis of multiple individuals, which one of them is the perpetrator. Failing that, the police seek to at least eliminate individuals from suspicion and thereby narrow the pool of potential suspects.

Second, the police draw potential significance from an individual's refusal to consent to provide a DNA sample. Although an individual is, of course, legally entitled to refuse to consent, it may cause the police to suspect that the individual may be connected to the crime.¹⁰ This may result in police focusing on that individual. Indeed, that was precisely what occurred here. Henry Cooper's refusal, coupled with demonstrable lies associated with his refusal, prompted the police to obtain his cast-off DNA, leading to his arrest and conviction.

DNA CANVASSES AND VOLUNTARINESS

As I observed earlier, when the police request that multiple individuals provide bodily samples, they must ensure that the consent is both informed and voluntary.

The jurisprudence recognizes an inherent power imbalance between the police and a civilian. The dynamics that may exist when a police officer "requests" the assistance of any individual cannot be ignored. Simply put, one

⁸ Burchill, J., "Mr. Stillman, DNA and Discarded Evidence in Criminal Cases," (2008) 32 Man. L.J. 5 – 33.

⁹ See for example: *R. v. F. (D.M.)*, 139 C.C.C. (3d) 144; *R. v. Nguyen*, 57 O.R. (3d) 589, (ONCA); *R. v. Love*, [1994] A.J. No. 847 (QB); *R. v. Marini*, [2005] O.J. No. 6197 at para. 34.

¹⁰ *R. v. Osmond*, 2009 BCSC 550 at para. 51.

cannot equate a request made by a police officer with a request by one private individual to another. The very nature of the policing function and the circumstances which often bring the police in contact with individuals introduce an element of authority, if not compulsion, to a request made by a police officer. This is particularly true where the request is made of someone who may be a target of an ongoing criminal investigation.¹¹

The power imbalance may be heightened somewhat where the private individual is particularly vulnerable for any number of reasons. For example, migrant workers, whose standing to remain in Canada is both temporary and precarious, may fear that a failure to cooperate with the police will have adverse employment or immigration consequences. They may also lack an understanding of the limited use that can be made of their bodily samples or fear that their samples will be misused by authorities. These fears may be especially prominent for racialized workers who have either experienced or been told about discriminatory practices or racial profiling by the police or other government players.¹²

None of this means that vulnerable individuals are incapable of providing informed and voluntary consent to providing bodily samples. What it does mean is that the police must be particularly sensitive to the power imbalance that may exist, where such vulnerabilities are present, and take these vulnerabilities into consideration in how they seek and obtain consent.

CONCERNS ABOUT DNA CANVASSES

The use of DNA canvasses as an investigative technique has attracted criticism, most notably in the United States. Critics cite the inherent power imbalance described above, coupled with the heightened police scrutiny associated with a refusal to cooperate, to challenge DNA canvasses as presumptively coercive. Second, they raise concerns about the use and misuse of DNA samples provided by individuals cleared through forensic DNA analysis. Third, they question whether DNA canvassing represents a cost-efficient use of resources to solve crimes. At least one American study has concluded that DNA “sweeps” (as they are described in the United States) are generally ineffective in identifying the perpetrator. There are numerous instances cited where DNA canvassing has produced no real success, while using up significant police resources to collect group samples and incurring substantial financial costs for laboratories to analyze multiple samples.¹³ Finally, and perhaps most significantly in the context of this review, questions have been raised when this investigative technique focuses on a racialized community. It is argued that the authorities engage in racial profiling by stereotyping people of colour and, as a consequence, aggravate long-standing tensions that community policing and other efforts are designed to overcome.¹⁴ These criticisms have led to submissions, in Canada and in the United States, that DNA canvassing not be permitted without prior judicial authorization, or be substantially narrowed or modified.

¹¹ *R. v. Wills*, 1992 CanLII 2780 (ON CA) at para. 45.

¹² In a 2003 article, *The DNA Dragnet: A Modern Day Salem Witch Hunt*, 10 C.R. (6th) 16, Vincenzo Rondinelli discusses psychological and sociological factors associated with a DNA dragnet that may cast doubt as to how voluntary an individual’s consent actually is.

¹³ Walker, S., & Harrington, M., *Police DNA “Sweeps”: A Proposed Model Policy on Police Requests for DNA Samples* (July 2005), p. 5.

¹⁴ *Ibid.*, p. 5.

THE HISTORY OF DNA CANVASSES

The first known use of a DNA canvass took place in 1987 in Leicester, England. The police approached Dr. Alec Jeffreys of the University of Leicester to see if DNA analysis could be employed to identify suspects in the sexual assault and murder of two young girls in the area.¹⁵ The officers believed that the two crimes were linked, so scientists using Dr. Jeffreys' technique analyzed samples collected from the deceased girls to generate DNA profiles (other than those of the deceased). The DNA profiles were identical, confirming the officers' belief that the crimes were linked. Interestingly, an individual who had confessed to one of the murders was exonerated because his DNA profile did not match the one obtained as a result of the DNA analysis.¹⁶

Police decided to use a DNA "sweep" or "dagnet" to request samples from 5,000 males in Leicester and the surrounding villages.¹⁷ The analysis of these samples did not result in a positive match. However, the case and the DNA sweep were a frequent topic of conversation in the community. As a result, an individual was overheard bragging about submitting his DNA sample on behalf of a friend. The police were notified and the investigation led to the identification of the individual who had used the braggart to disguise his own DNA profile. A true DNA sample from him produced a match, and led to his confession to the crime.¹⁸

DNA CANVASSES IN CANADA

The first reported DNA canvassing in Canada took place in 1994 in Vermilion, Alberta, a town of 3,800 people. Police were investigating a series of sexual assaults that had taken place over a three-year period. Bodily samples for forensic DNA analysis were collected from a number of men in the community.

When the canvassing first began, one of the RCMP investigators commented that, "I'm sure if someone were not to give blood and that were found out, he would be really, really unpopular." Eventually, the DNA canvassing was expanded to a larger group. However, after 18 months and the testing of 240 samples, no match had been found. Fearing that support in the community for the DNA canvassing was wavering, the RCMP organized a town hall meeting which was attended by 200 residents. At the meeting, two men who spoke in opposition to the investigative technique were heckled. The RCMP "warned that anyone who did not give a blood sample on request would face an intrusive background check."¹⁹ The DNA canvassing was ultimately unsuccessful nonetheless.

Another large-scale DNA canvass took place in Port Alberni, British Columbia in 1996. An 11-year-old girl had been sexually assaulted and beaten to death. After an exhaustive investigation that did not produce an arrest, the RCMP employed a DNA canvass. Four hundred and eleven samples were obtained. Three years after the murder, a DNA match was made using a sample that had been provided by the perpetrator.²⁰

¹⁵ http://www.policemagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=1320&issue_id=112007

¹⁶ *Ibid.*

¹⁷ <http://www.aboutforensics.co.uk/colin-pitchfork/>

¹⁸ *Ibid.*

¹⁹ Neil Gerlach, *The Genetic Imaginary: DNA in the Canadian Justice System* (Toronto: University of Toronto Press, 2004) at pgs. 184 – 185.

²⁰ *Ibid.*, at pg. 186.

From 1998 to 2000, a DNA canvass involving samples from 485 potential suspects was carried out during the investigation of a Sudbury murder. As of the time of this Report, this crime remains unsolved.²¹ Over 1,200 suspects have been eliminated since the investigation first began, primarily through DNA analysis.²²

A DNA canvass was employed in the investigation of the rape and murder of 10-year-old Holly Jones in 2003 in Toronto. Samples were taken from over 300 individuals on the basis of geographic location. The police focused on and ultimately apprehended a suspect because their suspicions were raised as a result of his refusal to participate in the process.

In 2011, the OPP employed a DNA canvass of individuals who were known to Sonia Varaschin, a murder victim in Orangeville. It is unknown how many individuals were approached for samples. The murder remains unsolved.

Another well-publicized DNA canvass took place in Prince George, British Columbia. The RCMP was investigating the murders of women along the so-called “Highway of Tears.” In February 2011, the RCMP conducted a DNA canvass of hundreds of taxi drivers in Prince George.

To carry out the DNA canvass, the RCMP contacted local taxi companies and asked to interview their employees. During the interviews, taxi drivers were asked to provide samples of their DNA.²³ At least one taxi company provided a list of its employees. Another taxi company was asked to allow the RCMP to use the office of the taxi company to carry out the interviews. The company declined the request.

The media reported that the RCMP told every taxi driver in the city that providing a DNA sample would eliminate them as a suspect or person of interest in the investigation. The manager of one taxi company told the media that many of the drivers initially refused to submit a sample, but eventually, all but two or three complied. Many drivers initially asked the RCMP to obtain a warrant, but provided the sample when investigators told them they would remain a person of interest if they did not comply with the request. The manager said, “It was worded in such a way that the drivers thought if they didn’t give their DNA, they believed they would be followed until they gave police what they wanted.”²⁴ So far, the DNA canvass has not resulted in any charges.

These are merely examples of DNA canvasses done or reported on in Canada. The OIPRD was provided with a number of additional examples of DNA canvasses undertaken in Canada. Some resulted in arrests; some did not. Statistics are not kept regarding the total number of DNA canvasses done in Ontario or nationally. The OPP reported to us that it has conducted a DNA canvass on six occasions in the past 19 years (excluding the Elgin County canvass). It is fair to say that DNA canvassing is not frequently employed as an investigative technique. However, unlike many other investigative techniques, DNA canvasses have a high public profile when used, because they both engage and have an impact on multiple members of the public.²⁵

Indeed, very recent media accounts demonstrate that the legitimacy of DNA

²¹ *Ibid.*, at pg. 186.

²² <http://www.sudburycrimestoppers.com/Crime%20Files/Rene%20Sweeney.aspx>

²³ Micheal Vonn, “Can a DNA Dragnet undermine an Investigation? A Case Study in Canada” <http://www.councilforresponsiblegenetics.org/genewatch/GeneWatchPage.aspx?pageId=377>

²⁴ http://www.thestar.com/news/canada/2011/02/14/highway_of_tears_murder_probe_asks_cabbies_for_dna.html

²⁵ More recently, according to the Canadian Press, Royal Newfoundland Constabulary officers asked tenants in a St. John’s apartment building for voluntary DNA samples the same day a man’s badly beaten body was found outside the building. An arrest followed shortly thereafter, though it is not currently known what role, if any, the DNA canvass played in that arrest.

canvassing continues to be debated in individual cases. In February 2016, CBC reported that the RCMP gathered DNA samples from men and boys in Garden Hill, a remote First Nations community 473 kilometres northeast of Winnipeg, in an effort to solve the homicide of an 11-year-old local girl.²⁶ Police sought the consent of about 2,000 men and boys (through their parents or guardians) in the community to provide their DNA. Garden Hill Chief Arnold Flett indicated that the majority of community members welcomed this move because they wanted the case solved. Sheila North Wilson, Grand Chief of Manitoba Keewatinowi Okimakanak, met with the RCMP and defended its tactic as a means to an important end for the community. She observed that residents didn't feel safe: "They're desperate for answers and I think I have to support what they want. If they don't feel like their rights are being violated then I have to respect that."

On the other hand, Corey Shefman, a human rights lawyer and past president of the Manitoba Association for Rights and Liberties, reportedly said that the RCMP's request was far from voluntary and is an example of the systemic racism that First Nations people face. He said that questions must be asked about making generalizations and sweeping conclusions about a First Nations community: "Some 60 per cent of people in Manitoba jails are indigenous and we can't ignore that context..." He was also concerned about the retention of collected samples in a database, though the police said that they explained that the DNA was being collected for this investigation only.

On March 17, 2016, the RCMP arrested and charged a 15-year-old male with first degree murder in the case. On March 18, 2016, Global

News reported that the RCMP would not confirm whether the youth provided a sample, but said that all DNA samples were destroyed and not on file for the future.²⁷ It is unknown at this stage what role, if any, was played by the DNA collection in the arrest.

DNA CANVASSES IN THE UNITED STATES

Police in various jurisdictions across the United States have also employed DNA sweeps, as they are known there, as an investigative technique. A 2005 study conducted by Samuel Walker and Michael Harrington of the University of Nebraska identified 18 instances of DNA sweeps in the United States between 1990 and 2004.²⁸ Those DNA sweeps collectively resulted in the collection of approximately 7,000 samples by the police. According to the study, the DNA sweeps were successful in identifying the perpetrator in only one case – and that case involved a very narrow sweep of employees in a nursing home who had access to a resident, who was in a coma and had been sexually assaulted and impregnated.

After reviewing these 18 sweeps, Walker and Harrington concluded that DNA sweeps were not only ineffective, but very costly. They ultimately proposed a very restrictive model policy to be adopted by police in the United States when contemplating the use of a DNA sweep.

Walker and Harrington and other commentators have also raised concerns about the disproportionate impact of DNA sweeps on racialized communities in the United States.

In several identified instances, large numbers of members of a racialized community were

²⁶ <http://www.cbc.ca/news/canada/manitoba/manitoba-grand-chief-defends-rcmp-collection-of-dna-from-2-000-men-boys-on-first-nation-1.3434835>

²⁷ <http://globalnews.ca/news/2585859/manitoba-rcmp-to-provide-more-details-on-teresa-robinsons-killing-friday/>

²⁸ *Police DNA "Sweeps": A Proposed Model Policy on Police Requests for DNA Samples* (July 2005), note 13, p. 5.

targeted as part of a DNA sweep based on a broad or vague description. Not only were these sweeps unsuccessful in identifying the perpetrator, but they were said to “reinforce the impression that the police are stereotyping people of colour, and as a consequence aggravate long-standing tensions that community policing and other efforts are designed to overcome.”²⁹ I have cited a few examples below.

Ann Arbor, Michigan

In 1994, the police were investigating a serial rapist. Based on a broad description that the perpetrator was African-American, the police collected samples from 160 African-American males. The sweep did not lead to any arrest. Rather, the perpetrator was arrested when he was caught attacking another woman. He was not among the 160 men who had been tested by the police.

The community was very concerned about the manner in which the DNA sweep was conducted. There was evidence that the police used coercive tactics to compel production of the samples and did not destroy the samples they had collected. Several men claimed that their alibis were disregarded and that they were told that submitting a sample was the only way to clear their names. One man alleged that he was told that if he did not give a sample, the police would obtain a court order compelling him to do so.

As a result, a class action lawsuit was launched by some of the 160 innocent men who provided samples. One of the litigants alleged that he lost his job after detectives informed his co-workers that they wanted to interview him. He said, “It was horrible, your worst nightmare ... Who knows what they’ll do? They’ve got your

DNA ... Why would they want to keep something if you’re innocent?”

In 1997, the lawsuit was successful, the samples were ordered destroyed or returned and the plaintiffs received monetary damages.

Miami, Florida

More than 120 Hispanic males were asked to submit DNA samples in the course of a serial rape investigation. The perpetrator was later arrested, but not as a result of the DNA sweep. The samples that were provided were not destroyed by the police, but rather run through a database of unsolved crimes. One of the men’s DNA profile proved to be a match to evidence collected from an unrelated sexual assault. He was immediately arrested and charged. This example was cited by some as evidence of the utility of a DNA sweep. However, the police had neglected to speak with the victim prior to charging the man. When they did, she advised them that she had engaged in consensual sexual relations with him shortly before she was assaulted. He had not been involved in any crime. After three days in jail, the charges were dismissed and he was released.

Charlottesville, Virginia

Between 1997 and 2003, the police in Charlottesville, Virginia investigated a series of six sexual assaults that were linked through DNA evidence. Using a composite sketch of an African-American man, the police began seeking DNA samples. Approximately 200 men were asked for and provided DNA samples. The police ultimately suspended the sweep as a result of criticism that the criterion for asking individuals for samples was too broad.

²⁹ *Ibid.*, p. 5.

Omaha, Nebraska

In 2004, the police were investigating the sexual assault of four women over a period of two years. Using a broad description that the perpetrator was African-American, between 25 and 40 years of age, 5'3" to 5'9", stocky with a large stomach and between 175 and 250 pounds, the police gathered samples from 36 African-American men who were said to match the rough description of the perpetrator. Some of those who provided samples raised concerns that the samples were requested without any notice and in front of their wives and children. No suspect was identified as a result of the DNA sweep.

Walker and Harrington proposed a model policy for police requests for DNA samples. In their view, “[l]ocal law enforcement agencies should not be left to their own devices on the subject of voluntary DNA searches. A model policy based on thoughtful consideration of all the relevant issues is needed.”

Their model policy, *Police DNA “Sweeps”: A Proposed Model Policy on Police Requests for DNA Samples*, included the following key elements:

1. Police requests for voluntary DNA samples are permissible only when police officers have specific credible evidence linking a person or a very small number of people with a crime. Broad requests for DNA samples from individuals about whom there is no specific credible evidence are not permissible. Requests for voluntary DNA samples based on individualized suspicion are permissible.
2. When a person who has given a voluntary DNA sample is found to be not implicated in the crime(s) for which the DNA sample was obtained, that person shall be immediately notified in writing of that fact.
3. No DNA sample shall be retained by any criminal justice agency in cases where the person has been found to be not implicated in the crime(s) for which the sample was obtained. All such samples shall be delivered to the person within ten days after the notification required in Section [2] above.

The authors observed that, “[b]asic standards of decency require that people who have been cleared of suspicion be promptly notified. A written record of such notifications ensures that law enforcement agencies can be held accountable for complying with this requirement.” Equally, “[b]asic standards of fairness require that law enforcement agencies not retain personal information about a person who is not a criminal suspect. Failure to return any such evidence only creates distrust of the police and damages police-community relations.”

The authors also identified “best practices” to be adopted by the police:

- A. Only use DNA dragnets as a last resort
- B. Limit the scope of a dragnet to those who match the description of the perpetrator or who have access to the victim
 - i. If the court allows DNA dragnets to continue, it should limit the scope of a dragnet to those suspects who police reasonably suspect could have committed the crime.
 - ii. DNA dragnets should only be implemented when there is a description of a suspect that is sufficiently narrow that it does not include all members of a particular race or gender.
- C. Police should inform potential donors of their right to refuse to volunteer a DNA sample
- D. Police should not be permitted to threaten potential donors with increased scrutiny and future legal action

- E.** Police should destroy samples gathered from donors exculpated in a DNA dragnet or disclose how the samples will be used
- i. To ensure that consent to provide a DNA sample is voluntary, DNA samples should only be used for identification or exclusion in the case for which the sample was obtained. In addition, samples should be destroyed and DNA records expunged immediately upon exclusion of a donor in the DNA dragnet. If the court allows the use of a DNA sample outside of the purposes of the DNA dragnet, then police should be required to inform potential volunteers of the full scope of the use of their DNA samples.
- F.** Police should protect the privacy of innocent donors and those who exercise the right not to provide DNA voluntarily

Nebraska has since legislated on this topic. Its legislation is reproduced below:

29-4126. Limitations on obtaining and using samples.

Notwithstanding any other provision of law:

1. No DNA sample shall be obtained from any person for any law enforcement purpose in connection with an investigation of a crime without probable cause, a court order, or voluntary consent as described in subdivision (2) of this section;
2. In the absence of probable cause, if any person is requested by a law enforcement person or agency to consent to the taking of a DNA sample in connection with a law enforcement investigation of a particular crime, such consent shall be deemed voluntary only if:

- a. The sample is knowingly and voluntarily given in connection with the investigation of a particular crime;
 - b. The person was informed by a written advisory prepared by the law enforcement agency that the request may be refused and that such refusal does not provide probable cause or reasonable suspicion to believe that the person has committed a crime, and the person signs the advisory; and
 - c. No threat, pressure, duress, or coercion of any kind was employed, whether (i) direct or indirect, (ii) express or implied, or (iii) physical or psychological;
3. Any DNA sample obtained in violation of this section is not admissible in any proceeding for any purpose whatsoever;
 4. A person shall be notified in writing by the law enforcement agency immediately upon the determination that he or she has not been implicated by his or her DNA sample in the commission of the particular crime in connection with which the DNA sample was obtained;
 5. Except as authorized in subdivision (7) of this section, such sample and all identifying information pertaining to the person shall be delivered to the person within ten days after the notification required by subdivision (4) of this section with a written explanation that the materials are being turned over in compliance with this section;
 6. Except as authorized in subdivision (7) of this section, the law enforcement agency shall purge all records and identifiable information pertaining to the person specified in subdivisions (4) and (5) of this section;
 7. An accredited laboratory authorized to perform DNA testing under section

29-4105 shall be allowed to maintain the minimum records and supporting documentation of DNA tests that it has performed as needed for the sole purpose of complying with the laboratory accreditation standards as set forth by a national accrediting body or public agency;

8. No record authorized for retention under subdivision (7) of this section shall be transferred, shared, or otherwise provided to any national, state, county, or local law enforcement agency unless such person has been implicated in the case by his or her DNA sample;
9. Any aggrieved person may file an action in district court against any person, including any law enforcement agency, to enjoin such person or law enforcement agency from violating this section; and
10. Any person aggrieved by a knowing violation of this section may bring an action in district court for damages. A person found by the court to be aggrieved by a violation of this section shall receive damages of not less than one thousand dollars and may recover reasonable costs and attorney's fees.

DNA CANVASSES IN CANADIAN JURISPRUDENCE

As I have said earlier, as a general rule, it is lawful for Canadian police services to obtain bodily samples for the purposes of forensic DNA analysis from individuals who provide their informed and voluntary consent. The lawfulness of a request to provide a bodily sample, on consent, is not dependent on the existence of reasonable and probable grounds. It would

therefore appear to be lawful to obtain multiple bodily samples from an identified group of individuals pursuant to the informed and voluntary consent of each individual, unless the targeting of the group can be said to violate constitutional or legislative provisions. It can safely be said that in Canada, a DNA canvass is, as a general rule, legally permissible.

It is therefore not surprising, perhaps, that there have been very few reported cases in Canada where the legality of a DNA canvass has been an issue. In all but one of those cases, the defence focused on the validity of the consent purportedly given by the accused, and not on the lawfulness of the investigative technique itself.

In one case, the validity of the DNA canvass itself was challenged.

In *R. v. Osmond*, the accused was charged with the sexual assault and murder of a 13-year-old girl. The death occurred in Zeballos, British Columbia, a small, isolated community on Vancouver Island. Its population was estimated to be between 300 and 600 people. The community was accessible by water and was a 40-minute drive from the nearest paved road. Investigators determined that the victim had attended a party the night that she was murdered. As there were few other leads, the police decided to undertake a DNA canvass of 12 young men whom the police believed were “running around” the night of the party. Mr. Osmond was one of those men. He provided a bodily sample, on consent, that yielded a DNA profile that was a statistical match with DNA found on the victim's body.³⁰

At trial, Mr. Osmond's lawyer argued that DNA canvasses were an improper use of police powers because they invaded the privacy of persons who were not suspects. This argument was maintained despite evidence that Osmond consented to provide a sample. The defence

³⁰ *R. v. Osmond*, 2009 BCSC 550 (CanLII) at paras. 11 – 13.

contended that there is significant societal pressure on each requested individual in a small community to provide a sample of his or her DNA and that therefore, the request to provide a DNA sample was essentially a requirement to prove one's innocence.³¹

The court rejected the defence position. In doing so, it found it unnecessary to consider the broader policy implications of DNA canvasses because this canvass was reasonably narrow. The court noted that the community was small and isolated. It was therefore reasonable to assume that the perpetrator came from the community. Mr. Osmond was also closely connected to the family of the victim and to the location of her body.³² The court concluded that "this DNA canvass and the manner in which Mr. Osmond's consent was sought operated in a manner that was neither random...or unfair to him."³³

The defence also submitted that DNA canvasses were unconstitutional for another reason: namely, that a refusal to comply with a request for a bodily sample for forensic DNA analysis raises the suspicion of the police; hence, it was said to interfere with an individual's right against self-incrimination.³⁴ In rejecting this submission, the court held that a "refusal which only serves to 'raise the suspicions of the police' is of no real consequence. Suspicions are not evidence."³⁵

On appeal, the British Columbia Court of Appeal confirmed that in the circumstances of this case, the DNA canvass was a permissible investigative process.³⁶

In my view, there remains scope for a contention that a DNA canvass predicated on racial profiling or discriminatory practices implicates its

overall lawfulness, even where a particular consent is said to be informed and voluntary. However, it is for others to develop that argument in a case in which the issue squarely arises.

DESTRUCTION OF DNA SAMPLES AND THE RESULTS OF FORENSIC ANALYSIS

It is difficult to discuss the statutory and historical destruction of DNA samples and the results of forensic analysis without reference to what the CFS and the OPP did in connection with the investigation which is the subject of this systemic review. Accordingly, rather than await my findings in chapter five, I have described in this chapter both the existing law, practices and procedures surrounding destruction and how they have been interpreted and applied by the OPP in the context of its investigation.

Subsection 487.09(3) of the Criminal Code states:

Destruction of bodily substances, etc., voluntarily given

(3) Bodily substances that are provided voluntarily by a person and the results of forensic DNA analysis shall be destroyed or, in the case of results in electronic form, access to those results shall be permanently removed, without delay after the results of that analysis establish that the bodily substance referred to in paragraph 487.05(1)(b) was not from that person.

³¹ *Ibid.*, at paras. 51 – 55.

³² *Ibid.*, at para. 56.

³³ *Ibid.*, at para. 56.

³⁴ *Ibid.*, at para. 54.

³⁵ *Ibid.*, at para. 54.

³⁶ *Ibid.*, at para. 22.

When the CFS receives a bodily sample taken from a potential person of interest, it is referred to as the original comparison sample. A smaller sample is taken from the original sample for forensic DNA analysis. The practice in Ontario is that the remainder of the original sample is then returned to the investigating police force.

The CFS is responsible for the destruction of the smaller extracts. The CFS does this through the disposal of the extracts in biohazard containers that also hold other bio-hazardous waste. The extract containers are labelled only with a bar code. There is no link between this bar code and the origin of the individual samples. When the biohazard container is full, it is closed, sealed and sent for pickup by the contracted waste disposal company. The biohazard box is not identified as containing DNA extracts and it is collected as part of a larger shipment for disposal. After the containers are removed from the CFS, they are transported to the waste disposal company's facility for incineration. The CFS confirmed that all of the samples it held that were provided by the migrant workers were destroyed on October 27, 2014.

The investigating police force is responsible for the destruction of the remainder of the original comparison sample. The OPP confirmed that all 96 samples it held that were provided by the migrant workers were destroyed on April 11 and 12, 2014.³⁷ The swabs were destroyed by removing any labels attached to the packaging and then depositing each into a biohazard container stored in the biohazard disposal area located in a locked outbuilding within the secure compound at the OPP FIS location in Tillsonburg. The destruction of these samples is recorded

in Exhibit Continuity Notes and the notes of FIS Constable Bates.

Prior to the collection of DNA from the migrant workers here, the CFS and police services in Ontario, including the OPP, had already created or identified protocols or procedures to govern notifications between the CFS and police as to when a donor had been cleared, and when destruction of bodily substances was to take place or had taken place. These protocols or procedures were subsequently refined in a February 7, 2013, memorandum sent by the CFS to all Ontario chiefs of police and the OPP Commissioner.³⁸ It states, among other things:

When a DNA analysis results in an exclusion, such as that noted in this report, the Criminal Code (ss. 487.09(1) (a) and (3)) mandates destruction of the comparison sample, the extracted DNA from the comparison sample and the results of the forensic DNA analysis of that sample. The remaining original comparison sample has been returned to you and it is your responsibility to ensure Criminal Code compliance with respect to this sample – i.e., destruction of the sample and permanent deletion of the information that links the name of the person to the comparison sample.³⁹

The CFS also implemented a process to follow up with police services every three months with a list of all the reports issued in the previous quarter. That list is sent to the DNA coordinator for each applicable police service.⁴⁰

I take no issue here with the destruction of the bodily substances provided by the migrant workers by the CFS and the OPP and the timeliness of that destruction.

³⁷ Of course, this does not include Henry Cooper's samples.

³⁸ All Chiefs Memo – re: DNA Destruction, February 7, 2013.

³⁹ *Ibid.*

⁴⁰ *Ibid.*

There were more significant issues identified during our systemic review in connection with the disposition of bodily substances and related records.

The first issue relates to what notification, if any, is provided to cleared donors that their bodily substances are about to be, or have been, destroyed. One of the questions raised by the migrant workers during the OPP investigation was what would happen to the DNA samples they provided. It is true that the consent form they signed stated that the samples would be destroyed once it was determined that the bodily substance did not match the perpetrator under investigation. Nonetheless, many workers were still unclear and worried about what the police could do with the samples provided. During the systemic review, workers and their representative organizations remained uncertain as to whether the bodily substances had been destroyed as required by statute.

The evidence disclosed that no steps were taken by the OPP to notify any of the workers who provided samples or their representative organizations that the bodily substances were about to be or had been destroyed. The OPP submitted that there was no statutory requirement that the police provide such notification. That is correct. However, the OPP policy manuals are instructive in this regard. At the time the buccal swabs were collected from the migrant workers, the OPP had a manual in place that governed its handling of the samples: the OPP DNA Collection and Process Manual (OPP DNA Manual) – Version 9. It was silent as to any protocol, procedures or best practices governing notification to cleared DNA donors that their bodily substances were about to be, or had been, destroyed.

In November 2013, the OPP issued a revised

OPP DNA Manual – Version 10. It refined the procedures governing the destruction of consent samples:

When a comparison DNA sample obtained by a person by way of informed consent is excluded as being the sources of any evidence samples specified in the Consent Form, investigators shall destroy any sample materials returned by CFS without delay as outlined in **subsections 487.09(3) C.C.** (refer to All Chiefs Bulletin #13-0012 and section on Destruction Notices). According to a legal opinion obtained from the Ministry of the Attorney General, dated May 24, 2012, all related reports, documents and videotapes in police custody may be retained...

Due to changes made by CFS in April 2012 and the resulting All Chiefs Bulletin #13-0012 dated February 7, 2013, regarding analysis of Consent and Warrant samples, and CFS automatically returning a portion of the sample back to the investigator to allow for subsequent additional testing, notice for destruction of samples deemed to be excluded as the sources of submitted scene samples will occur as follows:

1. For older case submissions, a separate Destruction Notice will be issued and sent by CFS to the Provincial DNA Coordinator who will forward it directly to the noted recipients listed on the Destruction Notice.
2. For newer submissions, directions for sample destruction will be included with the Result Notification report that pertains to the analysis of the specific Consent or Warrant sample. Investigators should be vigilant in reading these reports to

determine if such a provision exists in the report. The provision will be noted by CFS in the “Conclusions” portion of the report. CFS will send out quarterly reports itemizing the specific reports and sample items for which the provision applies, in order to assist with follow up compliance with the above noted Criminal Code requirements.

The manual reflects that as soon as the CFS determines that a DNA sample has been excluded, it will send a Destruction Notice to the Provincial DNA Coordinator. The Provincial DNA Coordinator will then notify the lead investigator, who is then responsible for the destruction of the sample. Once the DNA sample has been destroyed, the lead investigator will notify the Provincial DNA Coordinator.

More significant, in the context of the notification issue, the manual also states that “it is recommended that the investigator contact the sample donor to allow the donor the opportunity of viewing the destruction.” To state the obvious, one cannot participate in the destruction process (or even have any awareness that the destruction has actually taken place) unless there is some notification provided by the police. Accordingly, there appears to be some disconnect between the recommendation contained in the manual and actual practice.

A second issue relates to the destruction of bodily substances discarded by individuals who are subsequently cleared by the police. Subsection 487.09(3) of the Criminal Code only mandates the destruction of bodily substances **provided voluntarily** by a person. It is silent as to destruction of bodily substances discarded by individuals, and then obtained by the police. There is currently no statutory requirement that

the police destroy such bodily substances, even if the individuals to whom they relate are cleared.

The OPP DNA Manual – Version 10 states that as there is no legislation pertaining to the destruction of discarded DNA samples, the investigators should follow the same retention rules as for scene evidence samples. That includes:

Detachment commanders, in consultation with the Regional DNA Coordinator, shall ensure that all investigative files including documents and DNA evidence are:

- Kept updated using Major Case Management protocol and/or Niche RMS⁴¹ with the appropriate UCR codes
- Flagged for indefinite retention unless occurrence is solved/closed, charges laid have been disposed of, and all appeal periods have been exhausted
- Maintained and archived in accordance with prescribed techniques and policies for safe handling and preservation techniques (application of appropriate methods and procedures to ensure that evidence is maintained in a condition suitable for future analysis of evidentiary items containing biological substances) unless subject to the previously noted destruction provisions of **subsections 487.09(1-3) C.C.**
- Reviewed regularly and following the end of the above retention periods, evidence items are returned to the owner (owner must be notified of presence of potential contaminated biological substances) or disposed of in accordance with Police orders and/or local policy

Simply put, the Manual does not require the OPP to destroy discarded samples.

⁴¹ Niche RMS is a police records management system used by the OPP and the majority of police services in Ontario.

Similarly, nothing compels the CFS to destroy discarded DNA samples. On the contrary, the CFS retains the DNA profile (a series of numbers) along with the sample identifier in its computer Discard Index. The extracted DNA is also stored indefinitely in a frozen state.

Several stakeholders, including the Office of the Information and Privacy Commissioner of Ontario and the Canadian Civil Liberties Association, have urged me to recommend either that the Criminal Code or applicable policies should be amended to treat discarded samples of cleared individuals no differently than samples of cleared individuals that were voluntarily provided.

The third issue relates to the destruction of, or removal of access to, records which contain the results of forensic analysis of DNA from cleared individuals. Subsection 487.09(3) is not confined to the destruction of bodily substances (that is, DNA samples). It also requires the destruction of the results of forensic DNA analysis or, in the case of results in electronic form, the permanent removal of access to those results if they are in electronic form. Again, these are only the results of forensic DNA analysis that has cleared individuals who voluntarily provided samples.

Currently, the Consent to Provide Biological Samples form reflects that “the samples will be destroyed and **electronic data related to the samples** will be permanently removed once it is determined that the bodily substance does not match to the crime under investigation.”

The CFS memorandum dated February 7, 2013, instructs Ontario police services that it is their responsibility to ensure Criminal Code compliance with respect to the remaining original comparison sample which has been returned to them by the CFS (i.e., “destruction of the sample and permanent deletion of the information that links the name of the person to the comparison

sample”). The OPP Manual – Version 10 directs, as already noted, that investigators shall destroy any sample materials returned by the CFS without delay as outlined in the Criminal Code. It goes on to state that “[a]ccording to a legal opinion obtained from the Ministry of the Attorney General, dated May 24, 2012, all related reports, documents and videotapes in police custody may be retained.” The OPP maintains that the legal opinion itself is privileged, and hence, its contents are not reflected in my Report.

I observe that subsection 487.09(3) only mandates the destruction of, or the permanent removal of access to, **the results** of forensic analysis of DNA provided by cleared individuals. The OPP investigation generated a variety of documents relating to the DNA canvassing that took place: for example, officer notes as to the identity of individuals who provided DNA samples, and audiotapes or consents capturing their agreement to provide such samples. There are obvious questions as to what records are said to capture the results of forensic analysis, as opposed to records that relate to the DNA canvassing, but are not properly regarded as capturing the results.

The OPP advised me that documents and electronic data relating to the investigation are retained indefinitely. The offences involved here (sexual assault with a weapon and forcible confinement) are “threshold offences,” making the investigation a “major case.” OPP Police Orders and the Police Services Act require the use of the Ontario Major Case Management system in such investigations. Major Case Management is supported by the software program PowerCase for records management. The names and particulars of individuals canvassed are recorded in PowerCase. PowerCase is managed directly by the Ontario Ministry of Community Safety and

Correctional Services. Information inputted into PowerCase by police services is stored for an indefinite period of time and information cannot be permanently deleted by police agencies.⁴²

The same information is also contained in the hard copy and electronic files of the investigation. The OPP advised me that it has received requests for disclosure under the Freedom of Information and Protection of Privacy Act (FIPPA) pertaining to this documentation. It is also the respondent in related civil litigation. As well, this systemic review is ongoing. No records can be destroyed where a request for access under FIPPA is pending, where there is a pending legal action, where a commission of inquiry or investigation requires the records as evidence, or where the Archivist of Ontario has imposed a temporary moratorium on records destruction.⁴³

Currently, the investigative files, including the migrant workers' names, consent forms, and audiotape recordings of interviews, are stored in the Crime Unit secure storage vault at the Elgin County OPP detachment. There is a single key to obtain access to this secure area, which can only be done by Crime Unit members. The consent forms were also scanned and are stored electronically on the secure network server at the Elgin County OPP detachment. Involved officers' notebooks are stored at their home work location for a period of seven years and then they are transferred to an OPP central repository for indefinite storage.⁴⁴

In my view, the underlying rationale for subsection 487.09(3) includes protecting the privacy interests of cleared individuals who provide DNA samples to the police, and ensuring that they are not prejudiced in the future by the unwarranted retention of records pertaining to them. It is important that appropriate practices

and procedures exist respecting the disposition of such records. Such practices and procedures protect the legitimate privacy interests of innocent persons, and if known more generally, also reduce the disincentives to providing DNA samples voluntarily. These important interests must be reconciled with the need for police accountability and effective policing – both of which entail the preservation of some documentation of the police investigation.

The issues here transcend DNA canvassing, or indeed the preservation of records pertaining to the results of DNA testing. Their resolution has significant implications for individual privacy and policing. The issues also arise at a time in which heightened scrutiny is being directed to the retention of policing records, and its impact on those affected. My recommendations address the future work that must be done in this area.

⁴² Memorandum to IPRD Gerry McNeilly from the OPP, April 7, 2016.

⁴³ *Ibid.*

⁴⁴ *Ibid.*



CHAPTER FIVE

Findings and Analysis

SUMMARY OF FINDINGS

1. In chapter one, I identified several core findings that I have made based on the available evidence. For convenience, these are repeated here, together with several additional findings that help explain my recommendations. The OPP investigation was not motivated by racial prejudice. In the particular circumstances, the police were entitled to focus on local migrant workers of colour to identify the perpetrator. Moreover, they were entitled to employ DNA canvassing as an investigative technique in an attempt to identify the perpetrator.
2. However, the DNA canvass here was overly broad. It was designed to obtain DNA from virtually every local migrant worker of colour,

regardless of his physical characteristics. The police reasoned that the breadth of the DNA canvass was justified since items left at the scene could have been taken or borrowed by the perpetrator from other migrant workers, whose DNA on these items might have indirectly led to discovery of the perpetrator. In my view, this rationale did not provide sufficient justification for the decision to seek DNA samples from virtually every local migrant worker of colour.

3. While I am satisfied that, in the particular circumstances of this case, the overly broad DNA canvassing was not based on stereotypical assumptions about migrant workers or persons of colour (and as such, did not amount to racial profiling), it is perfectly understandable why it would have

been perceived as such by members of the community and public interest organizations. Regardless of the lack of intent or motivation to discriminate, the nature and scope of the DNA canvassing could reasonably be expected to have an impact on the migrant workers' sense of vulnerability, lack of security and fairness. It could also send the wrong message to others in the local community about how migrant workers, as a group, should be regarded. A more focused DNA canvass was appropriate, and could have alleviated or reduced concerns about racial profiling, while supporting an effective and thorough investigation.

4. The OPP investigation failed to recognize the particular vulnerabilities of the migrant worker community targeted by the DNA canvass and how those vulnerabilities were relevant to whether the consents obtained were truly informed and voluntary. In fairness, the OPP took significant steps to attempt to ensure that consents were informed and voluntary. These steps were not always successful.
5. The investigation failed to adequately take measures to ensure, to the extent possible, that decisions by workers not to provide DNA samples remained confidential, particularly from their employer.
6. The authorities were obligated in law to destroy the DNA samples of individuals cleared in the investigation. This, in fact, was done in a timely way. However, a number of the migrant workers did not understand that their DNA samples would be destroyed or would not be used for other purposes.
7. The OPP took no steps to notify the migrant workers when their DNA samples were about to be or had been destroyed.

FINDING:

The Elgin County OPP was not motivated by racial prejudice.

Racial Profiling

A centrepiece of the complaint against the Elgin County OPP and its officers was that they engaged in racial profiling. While there is no universally accepted definition of “racial profiling,” it may be of assistance to explain what is generally meant by the term.

The Ontario Human Rights Commission defines racial profiling as “any action undertaken for reasons of safety, security or public protection that relies on stereotypes about race, colour, ethnicity, ancestry, religion or place of origin – rather than on reasonable suspicion – to single out an individual or group for greater scrutiny or different treatment.”

I accept and rely upon that definition, which also finds support in existing human rights jurisprudence.

The Ontario Provincial Police recognizes that racial profiling is unlawful. In its Diversity Journal Report, published in 2011, the OPP states that it was “among the first policing organizations to implement a policy against racial profiling and explicitly support bias-free policing through operational policy.”

The report goes on to say:

In 2004, section 2.37 of Police Orders, entitled Traffic/Enforcement/Road Safety was amended to include: Illegal profiling is not permitted and shall not be tolerated in any respect. Illegal profiling means taking law-enforcement actions, such as stopping/

questioning/searching/detaining/arresting a person, based solely on the person's:

- race
- age
- place of origin
- creed
- ethnic origin
- sex
- sexual orientation
- marital status
- colour
- same-sex partnership status
- ancestry
- family status
- disability
- citizenship

Racial profiling is a form of racial discrimination. It is contrary to the Ontario Human Rights Code for police to treat people differently based on stereotypical notions about their race, colour or ethnicity. Whether characterized as racial profiling or simply discrimination, it is equally unlawful for police to treat people differently based on stereotypical notions about their ancestry or place of origin.

It is also well recognized that racial profiling need not involve an intention or motivation to discriminate. The focus, particularly in human rights litigation, is on the effect of the impugned conduct on the affected individuals or group. As the OHRC noted, this is a reflection, among other things, that racial stereotyping will usually be the result of subtle unconscious beliefs, biases and prejudices.

It follows that differential treatment of migrant workers based on stereotypical assumptions about men of colour or about Jamaican men or men of Caribbean ancestry would, if proven, amount to prohibited discrimination. This would be so even if such stereotypical assumptions amounted to only one factor out of many leading to that differential treatment.

Accordingly, I have considered two related issues: (a) whether the OPP decision to focus

on migrant workers in its efforts to identify the perpetrator of the crime under investigation is explained, in whole or in part, by racial profiling and (b) whether the investigative technique adopted, namely the DNA canvassing of virtually all of the local migrant workers, is explained, in whole or in part, by racial profiling.

The Focus on Local Migrant Workers of Colour

The violent sexual assault on a local resident took place in the Municipality of Bayham. Bayham has a small population that is fairly homogeneous. It would appear that there are very few black people in the area other than those who work as migrant workers on farms. One of the local investigators told the OIPRD that he did not know of any people from Jamaica living in the township, although he did know of one African-American family living in the area.

When the victim reported the matter to the police, she described the perpetrator as black, with a heavy accent, possibly Jamaican. She provided a description of his clothing as well. She said she knew that he was one of the migrant workers who came to Canada to work on the farms.

In subsequent interviews with the police, she reiterated that the perpetrator was black, that he had an accent because she had a hard time understanding him, and that he was a migrant worker from the area.

The victim's residence is on a back road with the closest neighbour about a quarter of a kilometre away. During the harvesting season, the road is often travelled by migrant workers on their way to the orchards to pick crops. It is not a thoroughfare for other travellers.

The victim described how she would see the workers walking, cycling or driving along the road and that she would wave back to them if they

waved at her. She indicated that the perpetrator would have seen her there because she sits on her porch to smoke as the workers pass by. He would likely know that she lived alone.

Her home is also located not far from several farms and bunkhouses where migrant workers work and live while in Canada. The local migrant workers are racialized members of the community, most of whom are of Caribbean background or origin.

Detective Sergeant Gonneau told the OIPRD:

She lives in that area, she sees the migrant workers travelling by her residence all the time, so I trusted that she knew what she was talking about when she said those things and their proximity to the area. And again the fact that the season was ending and they were going to be going home, we had to, as in any canvass, go to a house and say, "Who lives here?" and there's maybe four or five people, but in that case it was a lot of people, so we were going to have to go talk to them...

[W]e were faced with an issue of our timeline because the harvest season was coming to a close and people would be returning home and as well, the description and the information that we had from the victim was not anything that was specific enough that it would necessarily assist us in, you know, pinpointing a certain person. It's not like we had a tattoo or a scar or anything like that. It was very broad and the discussion was around how are we going to deal with addressing this portion of the investigation that had to be investigated.

Detective Nolan also described the situation to the OIPRD:

Yeah we, when we made contact with the farmer, we arranged to start at that location and because of the nature of the information we had had, she lived on [address removed], it was a back road, there's not many neighbours. There was two other, actually three other bunkhouses... The information we got was that she was out on the porch every night and so she lived alone, so our thoughts were that she indicated that the person would have seen her there because she watches them go up and down the street on a regular basis. So work in the fields, going back and forth to the bunkhouses led us to believe that it was, it could have been any one of those persons living in the bunkhouse at that point. So we started at the closest location and then worked our way to the furthest. The other thing that kind of, I can't say we knew that this early, but at some point we knew that that particular weekend there was a farm party where all the workers from all the neighbours come in and they partied and they partied at the, wasn't the Rosenberger House but it was the one... where there was two bunkhouses... so we kind of started at the Rosenberger House and because of the interaction back and forth and travelling, it could have been any one of the workers that had opportunity to know that she was out there on a regular basis and that she was living alone...

All of the available information led the police, correctly in my view, to focus their investigation on the local migrant worker community. The description given by the victim of the perpetrator's skin colour and accent, her residence's proximity to orchards and bunkhouses where the migrant workers worked and lived, the nature of the typical traffic on the road, and the generally homogeneous population of Bayham all strongly

pointed to the perpetrator as one of the black migrant workers who lived near the victim's house. This inference did not depend on any stereotypical assumptions or preconceptions about criminality and men of colour.

Moreover, we have reviewed the entire investigative file of the OPP. There is no evidence from that review to indicate that the police focused on the migrant worker community for any improper purpose or reason. While I recognize that such evidence would not necessarily be apparent on the written record, I am satisfied here that it was not the case.

In this regard, I am bolstered by the interviews my office conducted with the migrant workers and the investigating officers. By all accounts, the investigating officers acted professionally in their dealings with the migrant workers. They were unfailingly polite and courteous and did their best to accommodate the workers' work schedules so as not to interfere with their paid labour. I know, all too well, that racial profiling and discrimination can be undertaken by people who are nonetheless polite and courteous. The officers' manner of dealing with the workers is only one factor in determining what inferences of fact should be drawn from the circumstances.

The police also made a significant effort to explain to the workers the voluntary nature of the decision to provide DNA, their right to refuse, their right to consult with counsel and that any refusal would not jeopardize their employment in Canada. This does not mean that the police conduct was without flaws or raises no concerns. I discuss those flaws and concerns below. However, I am satisfied, based on the totality of the evidence, that the OPP's decision to focus on local migrant workers to identify the perpetrator was not motivated by racial prejudice.

FINDING:

The DNA canvassing of virtually every local migrant worker of colour, regardless of his physical characteristics, was overly broad. While it was not based on stereotypical assumptions about migrant workers or persons of colour (and as such, did not amount to racial profiling) it nonetheless could reasonably be expected to impact on the migrant workers' sense of vulnerability, lack of security and fairness. A more focused DNA canvass would have been appropriate.

I have concluded that the manner in which the OPP implemented the DNA canvass was overly broad. My reasons for that are detailed below. However, before turning to that analysis, I recognize that the police faced some particular challenges in this case.

The first challenge was that the workers were seasonal workers who were scheduled to leave Canada within a very short time frame. In fact, some of the workers had already gone home. It is not a typical feature of an investigation that the perpetrator is likely embedded in a large group of individuals who are all leaving the country in short order.

The Elgin County OPP cited this increased pressure as a reason to move swiftly to obtain DNA even before other evidence had been collected or analyzed – indeed, before the OPP received confirmation from the CFS that a viable male DNA profile had been extracted from the crime scene.

Various officers described the time pressures in interviews with the OIPRD. Detective Staff

Sergeant Raffay, who made the decision to conduct the DNA canvass, said this:

Well, the victim had provided information that the suspect had brought with him several items... There was interaction between the suspect and the victim which would make you believe that there could be DNA on these items. The victim provided a description of the suspect and some information on the suspect and from that information, I learned that there were several farms in the area that housed, or that employed migrant workers and that it seemed like a logical step to canvass that area. And being that those individuals were going to be leaving in a short period of time, we had to gather what evidence we could and I thought [a DNA canvass] was a viable and a good investigative technique to do that.

Inspector Peer, the OPP West Region Area Manager of Criminal Operations, said this:

The investigative thought seemed to be, that given the description we have farms in proximity so this seems like a likely place to look... We had some pressures because people were leaving – possibly people are leaving the country that may have been involved. Detective Staff Sergeant Raffay thought that [the DNA canvass] was going to be a viable thing. It was presented and it seemed like a reasonable approach.

I think the reason it may have been so quick was the assessment of the scene – we had somebody that was fairly well organized, that brought stuff to the scene, had the weapon. There seemed to be some determination and forethought into what was going to take place here, and that people were leaving

was the impetus, you know, if I do the crime and I'm going to leave... I don't think we had a DNA sample at the time and this was the other consideration. We think we're going to have something that's viable for DNA. So, with the people leaving and this idea of the limited description, I think this is what brought the rationale that one, there are some time pressures; two, we've got a demographic in proximity to the scene that it seems viable that we should go to the community and say, "Look we've had this situation and this is what we're confronted with, our description. We have no specific suspect to point to so can you help us with this?" And that, essentially, was the rationale, as I understand it. There was nothing really with the rationale that caused me a great deal of concern.

Detective Sergeant Gonneau said this:

I would say that in another circumstance where we weren't faced with the fact that people were going to leave the country, things could possibly, if we had more time, maybe the decision would have been made differently. But I think that was a constraint on us for sure. Normally, would we seek DNA unless we had DNA? I don't think so, but we were certainly hopeful we were going to get some DNA, if not from her, surely we would have gotten something from the shirt.

The second challenge that the involved officers said figured prominently in the scope of the DNA canvass was the potential unreliability of the victim's description of the perpetrator. To be clear, there was no concern about her truthfulness or honesty, but instead about the extent to which the police could rely on her description.

During the investigation, the Elgin County OPP appeared to have had enough confidence in the description the victim gave of the perpetrator to put it in a news release seeking the public's assistance in solving the crime. The composite sketch of the perpetrator, based on the victim's description, was also shown to farm owners during interviews with police. None of the officer notes, will-says⁴⁵ or the minutes of the case meetings mentions any doubts or misgivings about the description of the perpetrator provided by the victim. In fact, when asked by the OIPRD how the description given by the victim compared to the description of the individual who was charged and convicted of the crime, Detective Constable Nolan said:

Actually she was pretty close. I can't deny that she was.

However, in interviews with the OIPRD, all the officers who took part in the investigation outlined concerns about the accuracy of her description. Detective Sergeant Gonneau told the OIPRD:

I had concerns with perhaps the accuracy of the description necessarily because of the circumstances under which she had obtained it. She was taken by surprise from behind; she was immediately thrown into a brick wall; she was literally frightened for her life; she was choked; she was dragged; she was blindfolded; she was tied up. Part of her observations made of him was when she was partially blindfolded so I had reservations in hanging my hat on specifics of this description.

Detective Constable Nolan said this:

We also know, and we have to take into account, that given the circumstances of the

traumatic experience that she went through, eyewitness accounts are frail. The courts have ruled sometimes they are unreliable because there have been false [identifications]. And so when we looked at it, we were careful not to just narrow it down to her being exactly right for those frailty issues.

Detective Constable Chandelier expressed a similar view:

It is common knowledge, and the courts have said, that there are frailties in victim accounts and victim descriptions. So, I don't think you can go to the letter of what someone has described, especially in that sort of situation, like she's been accosted in her home by a person who's very covered up. We didn't want to limit the scope too much because... Well, she said she believed it was a Jamaican accent. In fact, the actual suspect, he was not Jamaican; he was from another island. Our thought, I think, was that if you pigeonhole too much that you may miss other information.

I accept that eyewitness descriptions of a perpetrator – particularly in the circumstances facing the victim – can be prone to error. Precision in estimating a stranger's age, height and weight or even a limited range of age, height and weight is difficult at the best of times. Indeed, the victim acknowledged in one interview her difficulty in distinguishing between the migrant workers of colour. In my view, the police were entitled to make reasonable allowance for potential inaccuracies in the description given by the victim and, accordingly, seek DNA samples from individuals who did not necessarily meet every descriptor provided by the victim. This is particularly so where the police knew that they

⁴⁵ A will-say statement is a summary of what a witness is expected to testify to in court.

might not have a second opportunity to expand their search if initial canvassing confined to those who strictly met the victim's description proved to be unsuccessful.

All that being said, the police sought DNA from virtually⁴⁶ every local migrant worker of colour, though a number of them could have easily been excluded based on the obvious and wide disparity between their features and the perpetrator's features, as described by the victim. Indeed, the evidence reveals that, in a number of instances, investigators reflected at the time that workers who were requested to provide DNA samples did not match the victim's description and raised no concerns as a result.

My finding that the DNA canvass was overly broad is also supported by the OIPRD's review of the questionnaires filled out by the police for every migrant worker who agreed to provide a DNA sample.

In total, the police took DNA samples from 96 migrant workers. The men ranged in age from **22 to 68**.

They ranged in height from **5'2" to 6'6"**. They ranged in weight from **110 lbs. to 328 lbs.**

By way of illustration, at Rosenberger House, the OPP took samples from workers with the following police descriptions:

- 68 years old, 5'5", 110 lbs.
- 45 years old, 5'4", 130 lbs.
- 41 years old, 5'3", 175 lbs.
- 33 years old, 6'6", 130 lbs., goatee

At Pastor House, the OPP took samples from workers with the following police descriptions:

- 61 years old, 5'7", 168 lbs.
- 51 years old, 6'1", 328 lbs.

- 38 years old, 5'3", 180-190 lbs., crooked front teeth
- 36 years old, 5'3", 209 lbs.

At Wilk's Farm, the OPP took samples from workers with the following police descriptions:

- 53 years old, 5'11", 200 lbs., full beard, dreadlocks, gold teeth
- 52 years old, 5'11", 215 lbs.
- 51 years old, 5'7", 225 lbs.
- 40 years old, 6'2", 270 lbs.
- 36 years old, 6'5", 240 lbs.
- 25 years old, 6'5", 150 lbs.

At least five workers were described as East Indian.

In summary, while I recognize the limitations of the eyewitness description of the perpetrator and the time pressures to complete canvassing quickly, I am also satisfied that a large number of migrant workers were unnecessarily asked to provide DNA samples and, as a result, a large number of DNA samples were unnecessarily taken. This contributed to a perception that the canvassing unfairly targeted the migrant community as a whole.

In the circumstances, it is hardly surprising that some workers felt that they were being racially profiled.

One worker said this:

I think it were racial cause they saying they're actually looking for a tall guy, slim and stuff like that. I don't fit that description. I see where big fat guys, they were actually doing their DNA and say that must be racial because there's none of us with that description.

⁴⁶ The use of the term "virtually" reflects the fact that 54 migrant workers were not asked to provide DNA because they were bused to and from work, and had no opportunity to commit the crime under investigation.

And from another worker:

I never fit that description, none at all... well, I'm black. If I'm coming here and I'm looking for a tall white man, why should I look for a little short man and say I'm going to question you.

Several of the lead investigators told the OIPRD that they felt at the time that it was appropriate to request DNA samples from every migrant worker, regardless of his physical characteristics. This viewpoint was based on the fact that the perpetrator had brought to the crime scene, and left behind, several items (two shoelaces and a strip of clothing) used to facilitate his crime. On the theory that the perpetrator might have taken these items from a fellow worker, a positive match with any migrant worker, even if not the perpetrator, might have produced evidence of the perpetrator's identity.

In my respectful view, this belief that items brought to the crime scene may have come from someone who was not the perpetrator, though genuinely held at the time, provided a poor rationale to justify taking DNA samples from every migrant worker of colour. It was a relatively remote possibility that any male DNA profile found at the crime scene would not belong to the perpetrator and that the perpetrator had brought someone else's shoelaces and strip of clothing to the crime scene.

If that possibility was a realistic one, I would have expected the police to take other investigative steps. For example, they could have searched for or asked migrant workers about the hoodie worn by the perpetrator or asked about the items left at the scene. In any event, there is no evidence that police explained to the migrant workers this alternative justification for seeking DNA samples from them.

To engage in such expansive canvassing on the basis of this relatively remote possibility unnecessarily contributed to the perception that men of colour or of Caribbean origin were being stereotyped and targeted. It also potentially contributed to unwarranted assumptions about migrant workers, as a group, by others in the community.

FINDING:

The investigation failed to recognize the particular vulnerabilities of the migrant worker community targeted by the DNA canvass, and how those vulnerabilities were relevant as to whether the consents obtained were truly informed and voluntary. In fairness, the OPP took significant steps to attempt to ensure that consents were informed and voluntary. These were not always successful.

FINDING:

The investigation failed to adequately take measures to ensure, to the extent possible, that decisions by migrant workers not to provide DNA samples remained confidential, particularly from their employer.

The Vulnerabilities of the Migrant Workers

In evaluating the approach taken to the DNA canvassing, the particular vulnerabilities of the migrant workers, which distinguish them from other employees, cannot be ignored. The migrant workers are not citizens or permanent residents

of Canada. They enter Canada on special permits under the Seasonal Agricultural Worker Program, a temporary foreign workers' program.⁴⁷ Their permits are tied to specific employers and they have very limited workplace mobility.⁴⁸ They are dependent on their employers for housing, wages and the ability to remain in Canada. Their current and future employability in Canada is, as a result, relatively precarious and dependent on the ongoing approval and satisfaction of the farm owners. They are not unionized and do not have a number of employment protections available to other Canadian workers.⁴⁹ This vulnerability was captured in a 2013 decision of the Human Rights Tribunal of Ontario in *Monrose v. Double Diamond Acres Limited*:

[11] I accept the evidence of Dr. Basok that migrant workers are exceptionally vulnerable workers and will have difficulty vindicating their rights in the workplace and elsewhere as a consequence of their unique vulnerability. I also accept her evidence that as a consequence of their unique vulnerability migrant workers rarely seek to vindicate what rights they have for fear of repatriation or not being asked to return in subsequent years. I also accept Dr. Basok's evidence that the consular and liaison officials from the supplying countries tend to be more interested in preserving the program for the workers in their countries than in vindicating the rights of individual workers. Dr. Basok made no comment on the particular circumstances of this case.⁵⁰

Moreover, migrant workers are separated from their families and home communities, and are likely to have little understanding of Canadian legal rights and duties. In the circumstances, it can reasonably be expected that they will generally cooperate with police and forego legal rights to which they are entitled, so as not to risk the displeasure of their employers or the police.

For example, one of the workers told the OIPRD:

He said to me, if you don't want to do it get a lawyer, so in myself, if I get a lawyer I'll be suspected. And he said he could provide us with a lawyer or a representative lawyer, but what I look at is it's my first year here and I don't want nothing to be bad on my record.

Another worker stated:

My concern was that after I finished everything they said I could contact a lawyer. But I believe that the first thing that they should present to me, when I came into the vehicle, was the instruction that if I don't want to proceed I could contact a lawyer.

The OIPRD reviewed the audiotapes of the DNA consent portion of the interviews that the Elgin County OPP conducted with the migrant workers. The officers were courteous and professional throughout. The migrant workers interviewed by the OIPRD confirmed this. There was no evidence that the police used pressure or coercive tactics to secure DNA samples. The police explained to workers that providing a sample was voluntary,

⁴⁷ The Seasonal Agricultural Worker Program is one of the streams in the federal government's Temporary Foreign Worker Program, which allows employers to hire temporary workers from Jamaica, Trinidad and Tobago, Barbados, the Organization of Eastern Caribbean States and Mexico. These workers can stay in Canada for up to eight months. Many return to the same farms year after year because their employers request them by name.

⁴⁸ If the workers' contracts expire before the maximum stay in Canada, they can only transfer to another farm with the approval of Service Canada. If they transfer without such approval, they can be banned from the Program.

⁴⁹ In February 2016, the Canadian federal government announced plans to ask a parliamentary committee to review the Temporary Foreign Worker Program.

⁵⁰ 2013 HRTO 1273 (CanLII).

that the worker could refuse and that the decision to refuse would have no bearing on the worker's employment in Canada.

The Consent to Provide Biological Samples form also stated that their decision was voluntary and that workers had the right to consult counsel without delay. It provided a telephone number that would allow the worker to access free legal advice. Finally, there were workers who advised the OIPRD that they were unconcerned about providing DNA or how it might be used, and felt morally obliged to assist in identifying a predator in their midst. Simply put, while the vulnerabilities of the migrant workers, coupled with the role of the farm owners described below, are an important part of the narrative, and help inform how and whether DNA canvassing should have been done, it is overly simplistic to say that vulnerable workers are incapable, under any circumstances, of providing informed and voluntary consent to providing samples of their DNA.

The Role of the Farm Owners in the Investigation

The migrant workers were all employees of farms in the area. Not surprisingly then, the Elgin County OPP contacted the farm owners and their staff to learn about the number and names of their employees. The owners and their staff also facilitated the interviews that followed. For the police, this appeared to be the most efficient way for them to speak with the workers and collect their DNA. The OPP was also attempting to avoid interfering with the fruit picking that had to be completed.

Detective Staff Sergeant Raffay advised the OIPRD:

Obviously we had to speak with the farmers to get permission to be on their property and we

wanted to ensure that we didn't inconvenience both the workers and the farmers. The workers are here for employment, to make money, and we didn't want to take that away from them, so we tried to pick a time that was opportune to both of them. So the investigators spoke to the farmers to make arrangements for that part of it.

Detective Constable Chandelier added:

We liaised with the owner of the farm and the management of the farm. They knew what we were doing and they were basically facilitating us being able to talk to the people because they are big farms and trying to track everyone down separately would have been an issue.

Detective Constable Nolan told the OIPRD:

We felt the best way was to get a hold of the farmer, the owner, and arrange through him. What we were thinking was, we don't want to interrupt his farming, we don't want to take the workers away from their jobs, so if we arranged it through the farm owner, either before or after they work, then we would just attend their farm – preferably the location where they're living so when they come home or when they're getting ready to go out, we can kind of do it one at a time and do the least amount of interruption in their life.

In chapter two, I provided some limited description of the role that the owners and their staff, particularly at Martin's Farm, played in the police investigation. Some repetition and elaboration is necessary here.

Leighton Martin described his initial communications with the police and his workers as follows:

The message was given about the situation, which was serious. The description given to police by the victim was that of an offshore worker, they started with Martin's Farm because they were closest to the scene of the crime. The OPP told us that they are coming to have interviews with all of them. The OPP was courteous and said that they wanted to work it into the farmer's work plan as best they can. They told the farmers about the test and that they were going to ask the workers, but they need to be ready to volunteer. It was not something they can demand of them. That was explained to the workers.

In a follow-up interview with the OIPRD on December 11, 2015, Mr. Martin expanded on his role in the investigation. After he was contacted by the OPP, he met with his employees in their work groups (typically, consisting of 12 people). He advised them that the police were coming to interview them because of the incident that had occurred, that from the victim's description, the perpetrator appeared to be an offshore worker, and that the Martin's Farm bunkhouses were closest to the victim's residence. He told the workers that the police were doing an investigation and that no one was being accused of anything. He encouraged the workers to cooperate with the police and they, in turn, did not express any concerns to him at the time.

According to Mr. Martin, the OPP had not instructed him to deliver this particular message or any other. They simply asked for his help to coordinate the interviews and the taking of DNA samples. The goal was to ensure the police could conduct their investigation with minimal interference to the fruit picking work to be done.

Nor did Mr. Martin have any contact with community organizations or community

representatives before speaking with his workers. He did contact the Seasonal Agricultural Worker Program Trinidad liaison office to advise them of what had occurred, as the situation involved the migrant workers in the Program. Martin told the OIPRD that when the liaison officer was first informed, she suggested that it might not be proper that the police were doing this before they had proof. Ultimately, the liaison officers played no role in the unfolding investigation.

Martin also told the OIPRD that later in the investigation he learned that two⁵¹ men, including Cooper, had not provided a sample. The police did not instruct Martin to take any follow-up steps, but Martin did approach two of the men and encouraged them to cooperate. In a statement to the OPP, he indicated that the men would not be invited back unless they consented to providing a DNA sample. Martin said that one worker objected to providing a sample. The worker did not trust the police not to misuse the sample. Martin was not very concerned about this particular worker because he did not match the perpetrator's description.

Cooper, on the other hand, did match the description. According to Mr. Martin, when he approached Cooper to discuss the issue, Cooper told him that he was fasting because his parents had died. Martin knew that to be untrue as Cooper's brother, who also worked for Martin, made no mention that their parents had died. This raised Martin's suspicions. Martin encouraged Cooper to cooperate and provide a sample. He told Cooper that the decision whether to provide a sample was voluntary, in the sense that he could not be forced to participate. However, Martin advised Cooper that he would not be invited back the following year if he did not cooperate. Cooper's refusal to participate even after that caution raised serious concerns for Martin.

⁵¹ According to the OPP documents disclosed to the OIPRD, three workers from Martin's Farm refused to provide a DNA sample, one being Henry Cooper.

In his interview with the OIPRD on December 11, 2015, Mr. Martin indicated that he alone crafted and delivered his message to Cooper. The OPP never told Martin to speak to Cooper (or the second worker) and never provided Martin with a message to be relayed to Cooper.

As indicated earlier in this Report, no police officer who was interviewed by the OIPRD indicated that he/she had told Mr. Martin about the individuals who refused to provide samples. However, it is clear that Martin believed he knew who had refused. His recollection was that the police gave him this information.

If the police did advise Martin that particular workers refused to provide a sample, this was incompatible with the information they were providing to the workers that any refusal would not be disclosed to their employer. I accept that the police did not instruct Martin to challenge the workers who refused to provide a sample or, in Cooper's instance, to advise him that he would not be rehired if he refused to provide a sample. Martin's approach was incompatible with the information the police were providing to the workers that a refusal could have no employment consequences. One might, in retrospect, have little sympathy for Cooper, since he turned out to be the perpetrator. However, it was only because Martin believed, rightly or wrongly, that the other worker did not match the perpetrator's description that he did not also tell him that he would not be employed the following year if he continued to refuse to provide a sample. To state the obvious, the voluntariness of any "consent" that might follow such intervention by an employer would be highly suspect, regardless of what the police told the affected worker.

The involvement of the owner and his staff in organizing the workers for their interviews and in describing the process to them was also problematic. It meant that the police were not in

a position to monitor or control what information was or was not provided to the workers about the investigation, the anticipated interviews, the workers' legal rights, or the voluntary nature of the DNA canvassing.

Even if the farm owners accurately explained the voluntary nature of the decision to participate in DNA canvassing, the owners' perceived role in the process could undermine, in the workers' minds, the proposition that a failure to cooperate with the police would have no employment consequences. Their ongoing employment in Canada was dependent on having a positive working relationship with the farm owner. Workers would naturally feel pressured to cooperate with the authorities to please the farm owner, regardless of what was conveyed to them. This is not speculation or a remote hypothetical on my part. Some workers expressed this very concern in interviews with the OIPRD. Their comments included the following:

He give me choices... If I want to or not want to... So I have [to] do it. We want to come back up America... So me no do it you're here, we no get no call to come back to Canada.

If I don't give it what will the ramification of this be... it was a fear in not doing it... and I have loss in my income to my family back home... So, I had no choice.

I do think it was voluntary. It's just how the situation was that you just... you left with no choice because they came in, said that the police will be on the compound, they coming to get a DNA or something like that.

This problem was compounded by the presence of farm owners and/or their staff when the workers were directed to police cars or the mobile van

where DNA samples were taken. What happened at Martin's Farm is illustrative.

During some of the canvasses, it appears that Mr. Martin or one of his staff, John Banman, would accompany each worker to the police car for the initial interview. Neither was present in the police car for the actual interview. Once the interview was completed, the police read the Consent to Provide Biological Samples form to the worker. This was audiotaped, along with the worker's verbal consent. If the consent form was signed, the police directed the worker to a mobile van, where his DNA sample was taken. Of course, if a worker did not attend the van, it would have been obvious to Mr. Martin or Mr. Banman as well as the other workers present that he had refused to provide consent.

Mr. Martin described the process as follows:

The police first wanted to do it bunkhouse by bunkhouse and started with two bunkhouses that were closest to the site of the crime. We said actually to do it in working hours would work out the best, then the police can come out during working hours and we will bring them in crew by crew – the ones from this particular bunkhouse. I was present; I did not hear the interviews, but I was actually the one that brought the workers out of the fields, three or four at a time. They waited in the car with me until they were ready for them. The officer would come to the car door. He was very polite and courteous while the men were approached. And I will say too that the workers were very cooperative.

While it is clear that officers consulted the farmers about how best to conduct the canvass, there is no evidence that they made any effort to find out from the workers how and where they would have

preferred to have the canvass conducted. When asked whether there was consideration of doing canvasses at a location away from the farms, Detective Constable Wouters said this:

I don't know if it was [considered], but that wouldn't make logistical sense. We'd have to transport these people or they'd have to be transported to us and then taken back so that's that, just eating up the farmers' time and their time more. So, I don't think that would have made it easier. It might have been easier for us, because we could go into a building that's nice and clean and dry and warm and whatever. I'll tell you I froze out there a few mornings. It was as easy on those people as we could make it.

Detective Constable Nolan told the OIPRD:

I did another investigation when I first came into the Crime Unit and we had a fairly large investigation in the Amish community. The issue there is that they are not accustomed to police. It was a major sexual assault investigation, a number of people, like the entire community was involved – 35 families, including their leadership levels and all the way down. So what we did there is we met with the leaders of the community because they're very religious-based people, and we approached everybody through their deacon and we made sure they didn't say anything to the people about the investigation, basically prepped them for having us come onto their property. We went to their homes to make it more comfortable, and we had that kind of protocol set in place and it worked very well. When I re-look at this, that wouldn't have been such a bad idea to really have, I mean

it would be time-consuming, more than what it was I would think. But I mean, to be able to maybe prepare them better for us to come in and explain to them what we're doing and how we're going to do things and so forth – somebody as a buffer to kind of help them understand that this is the process and go through this.

As a general rule, DNA canvassing should not take place at a subject's workplace. There is an obvious concern that the subject's voluntariness might be undermined by the employer's proximity. I recognize that, in this rural setting, there were limited alternatives available to the police, especially when they were justifiably solicitous about not interfering with the work that was being done. However, the legitimacy of the process was undermined, however inadvertently, by the presence of the owner and/or staff during the canvassing and their role in describing the upcoming process to the workers. It would have been preferable if the owner or staff played no role in describing the process to the workers. Their description was undocumented and beyond the control of the police. It would also have been preferable, even if slightly less efficient, if the owner and staff were not present when workers were directed to the van to provide a DNA sample or sent back to work. Alternatively, the physical arrangements could have been configured differently to ensure that the owner and staff were not able to see whether each worker provided a DNA sample.

I have reviewed the audiotapes of the consents provided by the workers to the police. As I noted earlier, the police repeatedly advised the workers that the DNA test was voluntary, that they could refuse to provide DNA samples, and that their refusal would not affect their status in

Canada or their ability to work. Some workers confirmed to the OIPRD that the police specifically told them that their employers would not be advised if they refused to provide DNA. Such a representation could provide little assurance to workers who could themselves observe the presence of the owners and/or staff nearby.

In summary, I have identified circumstances – the particular vulnerability of migrant workers, the involvement of employers in facilitating the DNA canvassing and in being present during the process itself, and the fact that at least one owner knew who had refused to provide samples – that raise concerns about whether the consents obtained were truly voluntary in all cases. Some aspects of the DNA canvassing should have been done differently to minimize those concerns. Most significant, the investigation failed to adequately take measures to ensure, to the extent possible, that decisions by workers not to provide DNA samples remained confidential, particularly from their employer. This is tempered by the fact that the OPP officers demonstrated good faith and professionalism in their approach to individual migrant workers.

Other Material Circumstances

In my view, two other features of the DNA canvassing require some attention.

First, the police conducted their interviews of the migrant workers in their police vehicles. The workers were seated in the back seat. At times, both the officers and migrant workers struggled to see the consent forms. As one officer said during the interview process, "Yeah, the lighting in this car isn't always the best. We've got a flashlight if you need it to make it brighter."

It would have been preferable if the workers had been interviewed in a second mobile van or another private location on-site rather than in the

back of a police vehicle, whether unmarked or not. To state the obvious, these were not accused persons or even suspects.

Second, I have referred several times to the audiotaping that took place.

The police generally conducted their interviews in two parts. The first part involved the completion of the customized OPP canvass form – that is, the questionnaire. This part of the interview was not audiotaped. The second part of the interview involved a review of the Consent to Provide Biological Samples form with the worker and obtaining his signed consent. This part of the interview was audiotaped. While that was commendable, it is clear from listening to the recordings that the initial request for DNA was generally made during the first (and unrecorded) part of the interview. Indeed, we know that this occurred because the recorded part of the interviews includes the following statements:

Okay, and I just quickly asked you if you'd be willing to provide a sample of your DNA to prove that you're not the person that committed the sex assault and you said you would, right?

This is just a consent. You've, we just spoke briefly about providing a sample of your saliva, right? To eliminate you as a possible suspect in this sexual assault investigation.

And we'll just go through the, we had gone through the canvass form and at the end there you volunteered to give a sample of your DNA, is that correct?

... [W]e just finished the canvass form and you've agreed to give us a sample of your DNA correct?

Best practice dictates that the entirety of any discussion concerning consent should have been recorded, rather than recording only the purported confirmation of what had been discussed and agreed to before the recording began. The underlying rationale of audiotaping the process is to record, in a transparent and reviewable manner, the process leading to an informed and voluntary consent. A partial recording fails to serve that rationale.

FINDING:

The authorities were obligated in law to destroy the DNA samples of individuals cleared in the investigation. This, in fact, was done in a timely way. However, a number of the migrant workers did not understand that their DNA samples would be destroyed or would not be used for other purposes.

In chapter four, it was convenient to set out not only the existing law on destruction of DNA samples and related records, but to indicate that the CFS and the OPP had indeed destroyed, in a timely way, the DNA samples obtained from cleared migrant workers. They complied with their obligation under the Criminal Code.

However, despite efforts on the part of individual officers to explain to the migrant workers that their DNA would be destroyed if they were cleared and would not be used for other purposes, it is obvious that not all of the workers understood this. This remained true, even though the officers' explanation was coupled with language contained in the consent forms that also described the obligation to destroy the DNA samples of cleared individuals. This

is, of course, no reflection on the workers, but simply a reflection of the fact that these legal concepts were foreign to most of them. It is also a reflection of the fact that they were unaided by the assistance of counsel. I have already explained why the workers would largely have been inclined to cooperate with the police and not avail themselves of legal representation.

I also note that the consent form does not say that the sample voluntarily provided by the signator may only be used for the purposes of the identified investigation and for no other purpose.

Finally, as reflected in chapter four, the evidence discloses that the OPP took no steps to attempt to advise the migrant workers, once they had been cleared, that their DNA samples were about to be destroyed or had been destroyed. Similarly, the migrant workers were not provided with any opportunity to observe the destruction of those DNA samples. The OPP was under no legal obligation to act otherwise. However, its most recent DNA Manual recommends that cleared individuals be given an opportunity to observe the destruction of the samples they provided.

My recommendations in chapter six address the issues raised by these and related findings.



CHAPTER SIX

Recommendations

The Need for a Policy on DNA Canvasses

As reflected earlier in this Report, I am satisfied that the OPP investigation was not motivated by racial prejudice as alleged in the complaint to the OIPRD.

However, I also conclude that the decision of the police to conduct such a broad DNA canvass contributed to the understandable perception that the DNA canvass was based on stereotypical assumptions about migrant workers of colour. The manner in which the DNA canvassing was done also raises concern about whether the consents provided by members of a vulnerable community were truly voluntary.

Policing relies heavily on public acceptance and a shared commitment to justice. It is important that policing not only be free from racism, racial profiling, bias and discrimination, but is perceived as such by the community. In this context, it is crucial that a policy be created by the OPP and similarly situated police services to identify and ensure best practices and compliance with the law. My key recommendations provide guidance on the contents of such a policy.

Recommendation 1:

The OPP must develop a policy to govern how and when DNA canvasses are conducted. The policy must, among other things, identify and ensure best practices.

Recommendation 2:

Similarly situated police services should also develop such a policy.

I recognize that not every police service in this province has the resources to conduct DNA canvasses. Accordingly, in this context, a similarly situated police service is one which, by virtue of its mandate and resources, might reasonably be expected to employ, on occasion, DNA canvasses to further an investigation in which it is the lead or joint agency.

The Model Policy on DNA Canvassing

Recommendation 3:

The policy adopted by the OPP and similarly situated police services should conform to, or be guided by, the Model Policy on DNA Canvassing below.

Preamble

1. This policy outlines best practices in connection with “DNA canvasses.” Members of the police service are expected to be guided by, and comply with, the best practices identified in this policy. The policy also refers, at times, to statutory or constitutional requirements that must be complied with.
2. A “DNA canvass” refers to the police investigative tool of seeking to obtain DNA samples from a group of individuals without reasonable grounds or suspicion to believe that any particular individual within the group is the perpetrator. The group of individuals may be identified based on potential access to a crime scene or upon characteristics, such as race, shared with the perpetrator.

3. In deciding whether a DNA canvass will be conducted, investigators should be mindful, among other things, of the following:
 - a. DNA canvasses involve the expenditure of substantial human and financial resources both by police services and forensic laboratories.
 - b. The identification of a group of individuals based on race or colour or analogous identifiers may reinforce the impression that the police are stereotyping people of a certain identifiable group, and as a consequence, create or exacerbate tensions between the community and the police that community policing and other initiatives are designed to overcome.
 - c. DNA canvasses must be conducted in ways that are compliant with the Canadian Charter of Rights and Freedoms, the Ontario Human Rights Code and the Criminal Code. This means, among other things, that:
 - i. DNA samples can only be obtained directly from individuals, absent a court order or probable grounds, based on their informed and voluntary consent.
 - ii. DNA canvassing that relies on stereotypes about race, colour, ethnicity, ancestry, religion, or place of origin – rather than on reasonable suspicion – to single out an individual or group for greater scrutiny or different treatment amounts to racial profiling and discrimination.⁵² It is unlawful.
 - d. Some groups of individuals are particularly vulnerable based, for example, on the nature of their employment or status in Canada, requiring heightened sensitivity by police as to how their informed and voluntary consent should be obtained.
 - e. The retention of DNA samples of individuals cleared of involvement in the crime under investigation by DNA testing undermines the rights of those who voluntarily provide such samples.

⁵² Actions that rely on stereotypes about other enumerated grounds under the Ontario Human Rights Code may not amount to **racial** profiling, but amount to discrimination nonetheless.

Best practices

4. The following best practices should guide decisions as to whether and how a DNA canvass should be conducted, and what steps should follow the completion of the investigation:
 - a. Given the costs (both in the expenditure of resources and in police-community relations) associated with DNA canvasses, they should not be used as an investigative tool, absent special circumstances, unless:
 - i. there is a reasonable prospect that they will further the investigation in a meaningful way; and
 - ii. the seriousness of the offence under investigation justifies the associated costs.
 - b. In determining whether there is a reasonable prospect that a DNA canvass will further the investigation in a meaningful way, the police should consider, among other things:
 - i. how many individuals might reasonably be regarded as falling within the class of potential perpetrators and whether the number of such individuals can even be determined
 - ii. the specificity or lack thereof of any description of the perpetrator
 - iii. the extent to which the police have access to all, or the vast majority of, those individuals who might reasonably be regarded as falling within the class of potential perpetrators
 - iv. the availability of alternative investigative techniques.
 - c. The group of individuals whose DNA will be requested pursuant to a DNA canvass must share the characteristics of the perpetrator, as determined by the investigation. Reasonable allowance can be made, in this regard, for the imprecision of eyewitness descriptions of the perpetrator.
 - d. Police should protect the privacy of donors and those who exercise the right not to provide DNA voluntarily. This means, among other things, that:
 - i. an individual's decision whether to provide a DNA sample should not be unnecessarily shared with the individual's employer or third parties unrelated to the investigation

- ii. the police should make requests for voluntary DNA samples, to the extent reasonably practicable, in private.
- e. Any consent to provide a DNA sample must be informed and voluntary. This means, among other things, that:
- i. the police should advise the individual that he or she is not required to provide a DNA sample
 - ii. the police should not advise the individual that they can obtain a warrant to secure the DNA sample if it is not provided voluntarily
 - iii. the police should not coerce or threaten the individual to obtain a DNA sample
 - iv. the police should advise the individual that he or she may retain or consult a lawyer prior to deciding whether to provide a DNA sample voluntarily
 - v. the police should advise the individual how any DNA sample will be taken, and by whom
 - vi. the police should advise the individual what use will be made of the DNA sample and what will be done with the DNA sample and related information/data once the investigation is completed. Such advice must be consistent with the mandatory provisions of s. 487.09(3) of the Criminal Code.
- f. Consents should be obtained in writing. The written consent should accurately reflect, in plain language, among other things:
- i. the fact that the individual is not required to provide a DNA sample
 - ii. the use that will be made of the DNA sample and what will be done with the DNA sample and related information/data once the investigation is completed. The consent should specifically reflect that the DNA sample will only be used for the purposes of the subject investigation and for no other purposes and that it will not be retained if, as a result of DNA testing or other investigative work, the individual is cleared as a suspect in the subject investigation.
- g. Police should not seek the consent of an individual to providing a DNA sample for purposes unrelated to the subject investigation.
- h. Where the group of individuals whose DNA is being sought is a vulnerable group by reason of the nature of their employment,

status in Canada or analogous circumstances, the police should involve, if reasonably practicable, community-based organizations which represent the group's interests to facilitate access by group members to legal advice.

- i. Where the group of individuals whose DNA is being sought is a vulnerable group by reason of the nature of their employment, status in Canada or analogous circumstances, the police should take all reasonable steps to ensure that the community-based organizations and/or legal advisors are present and/or readily accessible at the time that the samples are being requested.
- j. If it is necessary to conduct DNA canvassing at an individual's place of employment, neither the employer nor his/her agent should be present at the time of the contact between the police and the prospective donor.
- k. In conjunction with subparagraph 4(f), the police should clearly convey, in plain language, both verbally and in writing, the voluntary nature of the decision to provide DNA. These discussions should be recorded in their entirety to ensure fairness and transparency.
- l. When an individual who has given a voluntary DNA sample is cleared as a suspect in the subject investigation, the individual should be notified, if possible, of that fact, either forthwith or as soon as reasonably practicable thereafter if notification forthwith could reasonably compromise the ongoing investigation. Such notification should generally be in writing or, at the very least, memorialized in writing.
- m. No DNA sample provided voluntarily by an individual pursuant to a DNA canvass should be retained by any criminal justice agency, including, but not limited to, the applicable police service and the forensic laboratory which analyzed the sample, where the individual has been cleared as a suspect in the subject investigation. The disposal of such a sample should take place without delay. The individual should be notified, if possible, of the disposal of the DNA sample as soon as reasonably practicable after the disposal has taken place.

- n. The police should purge all records and identifiable information pertaining to the individual who has been cleared as a suspect in the subject investigation except to the extent such records and identifiable information need to be maintained to document the subject investigation.
- o. Where the group of individuals that is targeted by a DNA canvass is vulnerable, or where the DNA canvass could create the perception of racial profiling or stereotypical thinking, the police should proactively work with community-based organizations to address these issues, reduce misunderstandings, and enhance police-community relations.

Commentary on the Model Policy on DNA Canvassing

Paragraph 2 contains a definition of a DNA canvass. Perhaps the most significant aspect of the definition is that the police need not have reasonable grounds or suspicion that a particular individual within the group is the perpetrator. This is consistent with Canadian jurisprudence that permits DNA samples to be taken from individuals in the absence of reasonable grounds or suspicion based on the donor's informed and voluntary consent.

Paragraph 3 articulates factors that should inform an investigative decision as to whether a DNA canvass will be conducted and, if conducted, how it will be conducted. The first two factors address the "costs," in the broadest sense, associated with DNA canvasses. DNA canvasses involve the expenditure of substantial human and financial resources both by police services and forensic laboratories. The identification of a group of individuals based on race, colour or analogous identifiers may reinforce perceptions of stereotyping by the police and exacerbate tensions in the community.

These concerns are captured in *Police DNA "Sweeps": A Proposed Model Policy on Police Requests for DNA Samples* (July 2005), referenced in chapter four. As I discussed in that chapter, the authors developed a model policy on the use of DNA canvasses as part of a University of Nebraska initiative. The State of Nebraska ultimately legislated in this area. The authors said this on the issue of costs:

Given the strong evidence about ineffectiveness [of DNA sweeps] as an investigative tool, they represent a serious waste of resources. The most serious waste involves the inefficient use of police officer time. The collection of large numbers of DNA samples also overloads forensic laboratories... It is a serious mistake, therefore, to further burden laboratories with additional samples arising from sweeps that are highly unproductive. Tests are also expensive, and consequently impose a dollar cost on already financially strapped agencies.

DNA sweeps also impose costs on communities affected and on police-community relations. Particularly in African American and Hispanic communities, they reinforce the impression that the police are stereotyping people of color, and as a consequence aggravate long-standing tensions that community policing and other efforts are designed to overcome.

The literature certainly supports, at least anecdotally in the United States and in Canada, some high-profile failures associated with the use of DNA canvasses. As well, it is obvious that DNA canvasses do involve the expenditure of valuable human resources. We know that the CFS is severely taxed with requests that it must prioritize for DNA and other forensic testing. The literature also supports, particularly in the United States, the concern that DNA canvasses targeting members of a racialized community can elevate police-community tensions.

The Model Policy on DNA Canvassing does not restrict DNA canvasses based on the costs associated with them, but rather ensures that decision-makers are mindful of these costs when structuring their investigations. If, for example, the group of individuals which might include the perpetrator is so broad that a successful DNA canvass is unlikely, the costs, in the broadest sense, associated with the undertaking should figure prominently in whether the canvass should even take place.

As was pointed out by several police services that made submissions to the OIPRD, the expenditure of time and money should never determine whether a serious crime goes unsolved. The police have responsibilities to the public and to the victims of serious crimes. The Model Policy only reinforces that time and money are relevant operational considerations.

The third factor highlights the requirement that DNA canvasses comply with the Canadian Charter of Rights and Freedoms, the Ontario Human Rights Code and the Criminal Code of Canada. A centrepiece of a DNA canvass is the informed and voluntary consent of those who are asked to

provide samples. The legality of a DNA canvass will be largely dependent on whether DNA was obtained pursuant to truly informed and voluntary consents. Some groups of individuals are particularly vulnerable based on their employment situation or status in Canada. Police must be mindful of such vulnerabilities when deciding how consents will be sought and obtained.

This is not to be regarded as some “indulgence” for some members of the community, and not others. Nor can it fairly be regarded as undermining the effectiveness of the police investigation. On the contrary, it simply recognizes, as does existing jurisprudence, that a determination whether a truly informed and voluntary consent was obtained is fact-specific. An employer asked to consent will almost always be differently situated than a migrant worker asked to consent in the presence of that employer.

The final factor relates to the retention of DNA samples of those cleared of involvement. Again, the design of a DNA canvass must consider, from the start, what will be done with DNA samples and how that will be communicated to those involved.

Paragraph 4 identifies 15 best practices to be included in a policy on DNA canvasses. These are, again, designed to ensure compliance with the Charter, the Ontario Human Rights Code and the Criminal Code of Canada, without compromising effective policing.

Subparagraph 4(a) reinforces what police services already acknowledge: DNA canvassing is to be employed as an exceptional investigative tool, rather than routinely. There may be special circumstances that justify the use of this tool even if the prospects of its success are limited: for example, where the crime investigated is very serious and the public is at risk. Nonetheless, in those circumstances the police should continue to be guided by the best practices otherwise identified in paragraph 4.

Subparagraph 4(b) highlights key considerations as to whether a DNA canvass is likely to be successful. They also figure prominently in evaluating the legitimacy of a contemplated DNA canvass. For example, based on the description of the perpetrator as a black man in North York, police would be unjustified in requesting DNA from black men in North York. The prospects of success would be highly remote, and equally important, such an approach would justifiably raise concerns about the unfair and illegal targeting of black men.

Subparagraph 4(c) reflects that DNA should only be sought from individuals who share the characteristics of the perpetrator, as determined by the investigation. As I have reflected earlier in this Report, reasonable

allowance can be made, in this regard, for the imprecision of eyewitness descriptions of the perpetrator.

Subparagraph 4(d) emphasizes the importance of protecting the privacy of donors and those who exercise the right not to provide DNA voluntarily. This is of heightened importance for vulnerable employees in their work environment, but is not confined to that scenario. Subparagraph 4(i) more specifically counsels police that the employer or his/her agent should not be present for the DNA canvassing even if it is conducted at the place of employment.

Subparagraph 4(e) provides some guidance as to the meaning of a truly informed and voluntary consent. It is drawn, among other things, from existing jurisprudence. A key component is that police advise a potential donor of the requirement that they destroy samples of persons cleared. Subparagraphs 4(f) and 4(k) articulate the best practices that consents should be obtained in writing and audiotaped or videotaped.

Subparagraph 4(g) incorporates existing law that the police should not seek the consent of an individual to providing a DNA sample for purposes unrelated to the subject investigation.

Subparagraphs 4(h) and 4(i) specifically address vulnerable individuals whose DNA is being sought. It encourages police to involve community-based organizations to facilitate individual access to legal advice.

Detective Constable Nolan advised the OIPRD that he had relied upon community leadership to facilitate another sexual assault investigation:

I did another investigation when I first came into the Crime Unit and we had a fairly large investigation in the Amish community. The issue there is that they are not accustomed to police. It was a major sexual assault investigation, a number of people, like the entire community was involved – 35 families, including their leadership levels and all the way down. So what we did there is we met with the leaders of the community because they're very religious-based people, and we approached everybody through their deacon and we made sure they didn't say anything to the people about the investigation, basically prepped them for having us come onto their property. We went to their homes to make it more comfortable, and we had that kind of protocol set in place and it worked very well.

It was suggested to him that, in hindsight, the OPP might have utilized the liaison officers affiliated with the temporary workers' program, SAWP, to assist. He responded in this way:

When I re-look at this, that wouldn't have been such a bad idea to really have, I mean it would be time-consuming, more than what it was I would think. But I mean, to be able to maybe prepare them better for us to come in and explain to them what we're doing and how we're going to do things and so forth – somebody as a buffer to kind of help them understand that this is the process and go through this.

Based on the input of stakeholders more familiar with the role of the liaison officers, I do not necessarily agree that the liaison officers would have been well situated to provide or facilitate such advice to individual migrant workers. The point here, reflected in Detective Constable Nolan's positive feedback, is that community organizations, if available, may well perform the role contemplated in the Model Policy.

Subparagraphs 4(l), 4(m) and 4(n) address the retention and destruction of DNA samples provided as a result of DNA canvassing. These best practices also conform to the requirements imposed by the Criminal Code.

Finally, subparagraph 4(o) encourages police to proactively work with the community to reduce misunderstandings and promote police-community relations. This would involve not only community organizations which represent individuals or groups whose DNA is being sought, but the local community as a whole. For example, the police can play a critical role in reducing, rather than promoting, stereotypes about vulnerable groups by clearly articulating what they are and are not doing.

Stakeholders' Submissions on the Draft Policy

As indicated earlier, a large group of stakeholders was asked to comment on a Draft Policy that was circulated to them for discussion purposes. As a result of their feedback, I made changes to the Model Policy on DNA Canvassing now contained in recommendation three. What follows is a brief summary of the submissions made respecting the Draft Policy and my response in italics.

Chief Evans, on behalf of the Peel Regional Police Service, felt that the Draft Policy was largely in keeping with her service's current practices and felt that the finalized policy would be an aid in developing the service's internal directives on DNA canvassing. She submitted that the terms "vulnerable group," "status in Canada" and "analogous circumstances" needed greater clarity.

In my view, although these terms are not defined in the Model Policy, their content is informed by my entire Report. I also believe that training of police officers should expand upon, and provide examples of the types of vulnerabilities relevant to whether and how DNA canvassing should take place.

Chief McGuire made representations on behalf of the Niagara Regional Police Service. He is also the President of the Canadian Association of Chiefs of Police. He agreed that racial profiling must be assiduously avoided, though he felt (based on his knowledge of the OPP investigation at issue) that it did not arise in this case. He felt that, while it is accurate that DNA canvasses are expensive and labour-intensive, their use is an operational decision, made by the chief of police, within the context of all of the pertinent investigative information. He suggested that the monetary and human resource costs were important factors in the operational decision, but did not belong within a set of administrative guidelines. Otherwise, he had no concerns with the Draft Policy.

Chief McGuire reiterated that it was important to ensure that consent is informed and voluntary, and agreed that the Draft Policy properly emphasized that the disposition of samples obtained from those cleared in the investigation should be communicated clearly when the sample is obtained and prompt notification should be given once their samples have been destroyed.

I agree with most of what Chief McGuire said. I am not necessarily convinced that the monetary and human resource costs associated with DNA canvassing should be excluded from a policy that identifies factors that properly inform whether the tool will be used in a particular case. I have clarified this point in my commentary. That having been said, there appears to be no disagreement that these are properly considered as factors, regardless of where they are stated.

Deputy Chief Rick Derus, on behalf of the Windsor Police Service, indicated that his service has no issues with the Draft Policy. Indeed, the Superintendent of Investigations noted that their service's use of a DNA canvass in a recent homicide case showed the value in conducting one when most other investigative techniques have run their course. He felt that the Windsor Police Service followed the protocol identified in the Draft Policy very closely.

Chief Larkin, on behalf of the Waterloo Regional Police Service, based on input from five branches of his service, felt that the Draft Policy was in keeping with Waterloo's views and past practices. His service supports a provincewide standard for DNA canvassing, the consent form to be used and training.

The Ontario Human Rights Commission (OHRC) provided detailed and thoughtful written submissions following receipt of the Draft Policy and the OHRC's participation in the roundtable.

The OHRC emphasized the importance of recommending adoption by Ontario police services of a policy on DNA canvassing, and of the recognition in the Draft Policy that investigators must understand the vulnerabilities of certain groups, such as migrant workers, and how those vulnerabilities should be considered in determining whether and how DNA canvassing should take place.

As is obvious, I agree.

Its specific recommendations about the content of the Draft Policy included the following:

- A. It should contain language that recognizes the need for DNA canvasses to be compliant with existing law, including the Charter and the Ontario Human Rights Code, which are paramount.

I have added language to this effect.

- B. The definition of a DNA canvass in paragraph 2 should make it clearer that police must have an individual's informed and voluntary consent, in the absence of reasonable grounds or suspicion.

In my view, this point is captured in subparagraph 3(c).

- C. The Draft Policy should add commentary on why phrases such as "absent special circumstances," "to the extent reasonably practicable" and "absent exigent circumstances" are used. The OHRC was concerned that use of such language could lead to an overly broad interpretation by police services of the policy, as opposed to the prevention of DNA canvasses that violate the Charter and human rights of members of racialized and other marginalized communities.

This concern was identified by a number of stakeholders. Rather than provide additional commentary, I have deleted most of these phrases as unnecessary or unsupportable by existing jurisprudence.

- D. The OHRC was supportive of references to the police working proactively with community-based organizations to facilitate access to legal advice or to address concerns about vulnerable targets, racial profiling or stereotypical thinking. It suggests that this proactive, trust-building approach be a recommended best practice for the OPP and other police services on an ongoing basis.

The OHRC observed that DNA samples were collected by the OPP from males with a significant range of height, weight, hairstyle, facial hair and build, many of whom did not match the description of the suspect except for the characteristic of having a “dark skin colour.” The Human Rights Tribunal of Ontario has found in other policing contexts that where race is seen to be the predominant factor in an investigation, this constitutes racial profiling. In its view, the targeting of male migrant workers was consistent with existing stereotypes about black men and the Ontario migrant worker population, and the requests for DNA samples were coercive given the racialized nature and unique vulnerability of the workers. It urged me to include commentary on racial profiling, why it is important, that it has been identified by the courts and tribunals as a systemic problem in policy, and how it may manifest in police activities. It felt it would be helpful to add definitions of racial profiling and stereotyping to the Draft Policy. It also submitted that my Report should explain why members of racialized and marginalized communities may feel coerced by even the politest requests from police.

I have added a definition of racial profiling to the Model Policy. My analysis and findings address a number of the points made here.

The Canadian Civil Liberties Association (CCLA) also provided detailed and helpful written submissions following receipt of the Draft Policy and the CCLA’s participation in the roundtable.

In its early submissions, the CCLA recommended that police services establish written guidelines surrounding the use and authorization of DNA canvasses. While it appreciated, in its later submissions, that the Draft Policy was responsive to the CCLA’s submission and contained several welcome measures, it felt that the Draft Policy did not go far enough to

ensure that DNA canvasses are conducted in a rights-respecting, privacy-protective manner. In its view, DNA canvassing is presumptively coercive and it is a best practice to obtain judicial authorization prior to engaging in DNA canvassing, absent exigent circumstances. At a minimum, it outlined ways in which the Policy should be strengthened:

- A. It should specifically state that, where consent is not truly voluntary, a warrantless DNA collection will violate the Charter. If, in the circumstances of a specific case, police cannot adequately mitigate the inherently coercive nature of a request for a person's DNA sample, they should not resort to this investigative technique.

In my view, the Model Policy now addresses the first point and strikes the appropriate balance in evaluating whether this investigative technique should be resorted to.

- B. The phrase "absent exigent circumstances" (or similar language) dilutes important safeguards and should be removed in subparagraphs 4(a), 4(d) and 4(e)(iv).

I have deleted a number of these phrases, though retained the phrase "absent special circumstances" in subparagraph 4(a). I explained why in my commentary.

- C. The Policy should explicitly prohibit police from making statements that suggest that individuals are under any moral or legal obligation to comply with voluntary DNA demands.

In my view, the Model Policy adequately addresses this point in subparagraph 4(e). I am not convinced that police should be prohibited from distinguishing between a moral and legal obligation.

- D. The Policy should categorically prohibit secondary uses of voluntary DNA samples in subparagraph 4(g).

I agree and have amended this subparagraph accordingly.

- E. The Policy should articulate that the destruction of voluntary samples of persons cleared and the purging of relevant records and identifiable information about those individuals are not merely best practices, but the law.

I agree and have amended the Policy accordingly.

- F. The Draft Policy emphasized that DNA canvassing can give rise to community perceptions of racial profiling and stereotyping, but should state that DNA canvassing may, in fact, constitute unjustifiable racial profiling, in contravention of the Charter and the Ontario Human Rights Code. It should explicitly state that police services should never conduct DNA sweeps in a manner that would constitute illegal and unconstitutional discrimination. It noted that the Code has been interpreted to prohibit the police from casting their investigative net widely on racialized individuals when dealing with a vague suspect description involving race: *Maynard v. Toronto Police Services Board*, 2012 HRTO 1220.

As indicated, I have strengthened the language in the Model Policy where it reflects statutory or constitutional requirements, not just best practices. I have also added clause 4(c)(ii) in response to this submission.

- G. The Policy should apply the same rules to any DNA collected by police surreptitiously from innocent individuals who exercise their right to refuse to provide their DNA on consent.

My response to item (g) requires some elaboration. This item concerns the retention and use of discarded DNA. As reflected in chapter two, the OPP surreptitiously obtained Cooper's discarded DNA once he refused to provide a DNA sample voluntarily. Jurisprudence supports the legal entitlement of the police to obtain discarded DNA under these particular circumstances without prior judicial authorization. There is a Criminal Code of Canada requirement that the DNA samples voluntarily provided by individuals who are cleared must be destroyed. There is no similar requirement for the discarded, but collected, DNA of individuals who are cleared.

The CCLA submitted that the discarded DNA of cleared individuals should be treated no differently than DNA voluntarily provided by cleared individuals. Otherwise, individuals cleared of any wrongdoing are prejudiced against simply because they exercised their legal right to refuse to voluntarily provide a DNA sample.

It said this:

The collection, retention and data-banking of “discarded” suspect DNA is highly problematic and, in CCLA’s view, renders DNA sweeps unconstitutional. The police approach a relatively large number of individuals. They variously suggest, either by public announcement or directly to the targeted individuals, that individuals have a moral duty to comply with the request, that people with nothing to hide are expected to comply, and that those who do not comply will face additional police scrutiny. Those who do not comply do, almost invariably, face additional police scrutiny: they are surveilled, and frequently police follow those individuals with the hope of obtaining “discarded” DNA from a cup, tissue, or other personal item. That DNA is subsequently tested – and retained for future purposes regardless of whether it constituted a match in this particular case. Those who exercise their right not to share DNA with the police, therefore, are in fact unwittingly subjecting themselves to a more privacy-intrusive DNA collection scheme. In CCLA’s view, such practices constitute an unreasonable search and seizure under s. 8 of the Charter.

I understand that discarded DNA samples are retained in a database, even if the individuals to whom they relate are cleared.

Despite the CCLA’s submissions, I am not convinced that the retention of discarded DNA necessarily renders DNA canvassing unconstitutional. Moreover, I am not persuaded that the mandate of this systemic review justifies recommendations on the discarded DNA of cleared individuals, particularly where there was no instance in the investigation under consideration where an innocent person’s DNA was obtained in this way. As well, stakeholders had little or no opportunity to address this issue. Any amendment to the Criminal Code falls within federal jurisdiction.

That being said, I too have difficulty with the proposition that the CFS or the police should retain the DNA of cleared individuals, whether voluntarily provided or discarded. Even in the absence of federal legislative change, there is no impediment to Ontario police services adopting such an approach and incorporating it into their policies. I invite them to give serious consideration to the merits of such an approach.

Justicia for Migrant Workers (J4MW) regarded the investigative technique used by the OPP in the subject case as racially motivated. It believes that the police should be called upon to admit guilt for the manner in which the canvassing was conducted. Moreover, the migrant workers whom J4MW has contacted want clear answers on whether their DNA was destroyed and whether it has been maintained in a database or shared with other agencies. It submits that it is important that steps are taken to disseminate information to the individual migrant workers that their DNA has been destroyed, if it has been.

J4MW's complaint to the OIPRD was not brought in the names of individual workers to prevent retribution. In its view, subparagraphs 4(h) and 4(i), which contemplate the potential involvement of organizations such as J4MW, would lead to a conflict of interest for it. Working with police agencies to cooperate in or facilitate a DNA sweep would have negative consequences for its advocacy efforts and cause irreparable harm to its relations with migrant workers.

J4MW shared the concerns with DNA canvassing that are set out in the American study of Samuel Walker, which I referred to in chapter four of this Report.

For the reasons already given, I do not find that the DNA canvassing employed by the OPP was racially motivated. Nonetheless, I accept that the migrant workers are entitled both to clear answers on whether their DNA was destroyed, maintained in a database or shared, and on the importance of providing information to individual migrant workers on what has happened to their DNA samples. The findings contained in chapter two of this Report, together with recommendation five, answer these concerns.

In my view, subparagraphs 4(h) and 4(i) do not necessarily place advocacy organizations in a conflict of interest or, properly understood, impair their relationship with migrant workers. Such organizations may play an important role in facilitating access to legal advice without compromising their position as advocates. They can work with and assist migrant workers in understanding their rights and provide support generally from an advocacy perspective. Similarly, they can work with police to ensure that employers are uninvolved or minimally involved in facilitating interviews with the police, again without compromising their position as advocates. I would think that the workers would welcome those kinds of involvement. However, I recognize that it is for J4MW to

decide, not me, whether it is in a conflict of interest and whether certain activities would impair its relationship with migrant workers.

The Metro Toronto Chinese and Southeast Asian Legal Clinic was concerned that the Draft Policy gave credence and legitimacy to the use of DNA canvassing, rather than discouraging its use. It felt that the wording “reasonable prospect to advance the investigation” was too inclusive. It also questioned the role that community organizations should play in facilitating DNA canvassing.

DNA canvassing is a legal, and in some circumstances, viable investigative technique used by the police to try to solve a crime. In this case, Henry Cooper was caught, arrested and prosecuted thanks to a DNA canvass. Thus, I am not of the view that DNA canvasses should never be used. However, the content of this Report and the recommendations I have proposed make it very clear that DNA canvasses come with many costs, social and financial. It is for that reason that the recommendations propose a fairly narrow and restrictive approach to the use of this investigative technique.

In some circumstances, community organizations can serve a useful role in ensuring that people being asked to provide a sample of their DNA understand the nature and implications of such a request, as well as their rights. Whether engagement with a community organization is appropriate is dictated by the particular circumstances of the case and must be left to the discretion of those involved. There is no hard and fast rule to guide the police and community on this issue. It depends on the specific context.

The Migrant Workers Alliance for Change (MWAC) forcefully questioned the scope of discretion for police contained in the Draft Policy. Based upon its ongoing dialogue with affected workers, it expressed concern about racialized policing, the absence of trust in the police and accordingly, the unlikelihood of truly voluntary consent, and the inappropriateness of employer involvement in the process. It sought accountability for racist policing, and the need to distinguish between mere perception of stereotypical police thinking and the actual experience of racism. It also submitted that the vulnerability of these workers, and how to address their feelings of coercion, should be clearly addressed. It too emphasized that, as an organization, it works with migrant workers to facilitate legal counsel, but would be hard pressed to “help” police by facilitating a racist practice.

I have already addressed a number of these submissions in earlier comments. I agree with the importance of distinguishing between perception of, and actual, police stereotypical thinking and have done so in my Report and in the Model Policy, though I did not agree with the ultimate inferences drawn by MWAC here.

MWAC referred to the unlikelihood of truly voluntary consent by migrant workers. Several stakeholders advanced the proposition that there can never be non-coercive participation by migrant workers or other vulnerable groups in DNA canvassing. I respectfully disagree. In the OPP's investigation, it was in the community's interest, including the migrant worker community, that a sexual predator in their midst be identified, arrested and prosecuted. Some stakeholders, while appropriately emphasizing the vulnerability of migrant workers and the importance of ensuring that they are not dealt with in a discriminatory or coercive fashion, gave insufficient attention to this community's interest in removing a sexual predator from amongst them. In my view, the adoption of the best practices contained in the Model Policy can lead to DNA canvassing that addresses all of the concerns identified.

The Criminal Lawyers' Association (CLA) disagreed with comments that the Draft Policy inappropriately legitimized DNA canvassing. In its view, the Draft Policy represented a welcome recommendation. The reality is that this investigative technique is used and can produce positive results. The CLA was impressed with the language contained in the Draft Policy, with the exception of unnecessary use of the phrase "absent exigent circumstances."

The submissions of the CLA contributed to my decision to remove several such phrases.

The OPP and the Toronto Police Service also provided meaningful input at the roundtable. The OPP representative agreed that the law is clear that samples voluntarily obtained to advance one investigation could not be used by police for other purposes. He agreed with the CLA that there was no need for the policy to qualify that principle through the use of the phrase "absent exigent circumstances."

Both the OPP and the Toronto Police Service emphasized that DNA canvassing (a term preferable to DNA sweeps) is an acceptable investigative technique. More importantly, police are trying to solve a

serious crime and bring the perpetrator to justice. They have a duty to the victim and the community to do so. They need to work with community organizations to accomplish those goals. Indeed, the OPP had concerns about the inclusion of human and financial resources as factors to be considered. It would not want a victim of sexual assault to feel that financial cost stood in the way of solving a serious crime.

I agree with these submissions, and believe I have incorporated them into my recommendations.

Training

Recommendation 4:

Training should be offered both by the Ontario Police College and by applicable police services as to the Model Policy on DNA Canvassing. It should be offered to new recruits and officers who might participate in or design a DNA canvass. Such training should include:

- A. The factors that should inform whether a DNA canvass is conducted and, if conducted, how it should be conducted
- B. Best practices and why they constitute best practices
- C. The law respecting informed and voluntary consents, and racial profiling
- D. Case examples as to how a DNA canvass may be structured to conform to best practices and avoid either the perception or reality of racial profiling, stereotyping or discriminatory conduct
- E. Some basic understanding of the vulnerabilities of certain groups, such as migrant workers and the racialized community, and how those vulnerabilities should be considered in designing an investigation and in promoting understanding between the police and affected communities

The OHRC and other stakeholders supported this recommendation. The OHRC suggested that the police invite input and possible participation from community-based organizations that represent vulnerable communities, as well as others who have expertise in human rights and policing issues. It felt the recommended training should include the following areas:

- A. Best practices consistent with the Charter and the Ontario Human Rights Code
- B. The law respecting racial profiling
- C. How requests by police for voluntary DNA sampling have a disproportionate impact on racialized groups and marginalized communities
- D. Case examples of how DNA canvasses can be perceived and/or result in racial profiling

The OHRC submitted that the training be provided for new recruits, current officers, investigators and supervisors.

I agree with these suggestions and have incorporated them into this recommendation.

More generally, the OHRC welcomed recent comments by the OPP Commissioner on the lack of tolerance for racism. It recommended that the OPP develop and implement distinct policies and procedures that clearly prohibit racial profiling, and collect race-based publicly accessible data on police stops, searches and DNA sampling practices to identify, monitor, evaluate and reduce racial profiling. It maintained that the OPP should actively recruit, select, promote and retain people from racialized groups, Indigenous communities and other under-represented groups and that the MCSCS provide appropriate direction to the OPP on all of the areas covered by the OHRC's proposals.

While I do find a number of these general suggestions by the OHRC to be commendable, they extend somewhat beyond the scope of this systemic review. Although not couched as a formal recommendation, I do urge the authorities to examine current practices and determine whether any police services across Ontario collect race-based publicly accessible data on practices that include DNA canvassing and whether all police services, in consultation with appropriate experts, should do so.

Destruction of DNA Samples

Recommendation 5:

The Ontario Provincial Police should publicly report, within 120 days of release of this Report, on:

- A. Whether all DNA samples taken from individuals other than the perpetrator, and records that contain the results of forensic DNA analysis, have been destroyed or, in relation to electronic records, access to the results has been permanently removed and what, if any, steps have been taken to so inform those affected
- B. What steps will be taken to inform those affected (if such steps have not been taken to date) of the actions described above

The OPP report shall not include information that might lead to the identification of individuals whose DNA was taken.

The need for the OPP to report back to the workers as to the disposition of their DNA was a common theme in the submissions of a number of stakeholders. The Waterloo Police Service noted that the OPP report should also not include information that might lead to the identification of anyone who refused to provide DNA.

The Consent to Provide Biological Samples

Recommendation 6:

The Ontario Provincial Police, the Ministry of Community Safety and Correctional Services and the Ministry of the Attorney General should re-evaluate, in accordance with this Report, the content of the Consent to Provide Biological Samples form.

In my view, these agencies are better situated, with the benefit of my recommendations, to consider the specific language that might be contained in a revised consent form. I do see several deficiencies in the current form. Most significantly, it is my view that the consent should

explicitly reflect not only that the voluntarily provided DNA will be destroyed, but that it will not be used for any purpose other than the identified investigation and that the consent authorizes no other such use.

The Destruction of, or Removal of Access to, Records Containing the Results of Forensic DNA Analysis Pertaining to Cleared Individuals

Recommendation 7:

The policies and procedures surrounding the destruction of or removal of access to records containing the results of forensic DNA analysis pertaining to cleared individuals should be reviewed. Clarity is needed as to what records are to be destroyed or made inaccessible and what records are to be retained. Consideration of this issue should be informed by the underlying rationale for Subsection 487.09(3) of the Criminal Code, the privacy interests of the affected parties and the need for efficient and effective police investigations.

In my view, the relevant ministries and police services would be well advised to consult with affected stakeholders, most particularly the Office of the Information and Privacy Commissioner, in reviewing existing policies and procedures. It is also important that the resulting policies and procedures be transparent and understandable. I defy most readers to understand precisely what records are currently subject to the existing destruction policy and what records are to be retained and for how long.



CHAPTER SEVEN

Conclusion

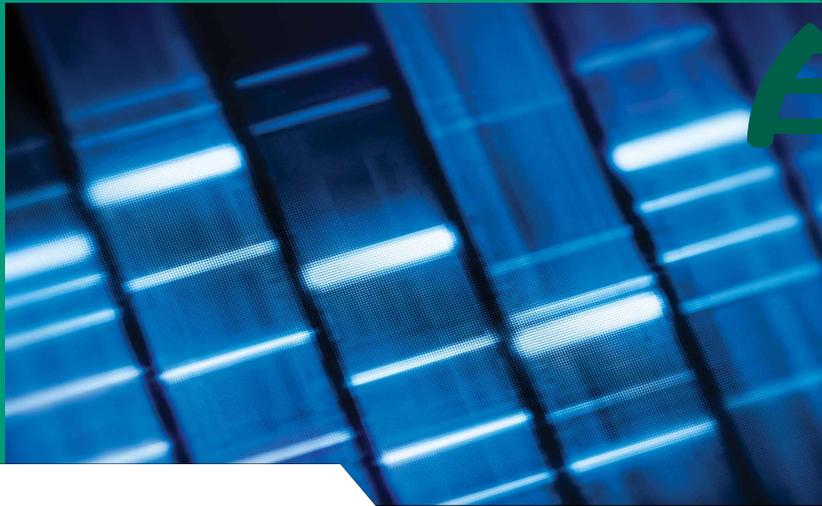
DNA canvassing may not be frequently used in police investigations in Ontario; however, when it is used it is highly public. It engages numerous members of the community. It asks those community members to trust the police to take their DNA, the source of highly personal information about them, use it for a single purpose and then destroy it, if they are cleared of involvement. That trust does not always come easily – especially for those who are vulnerable, who have experienced racism in their lives or in the lives of others close to them.

As I said at the outset, policing relies heavily on public acceptance and a shared commitment to justice. It is important that policing be free from racism, racial profiling, bias and discrimination. It is also important that it be perceived that way by the community.

Some may focus, whether in agreement or disagreement, on my finding that the OPP officers were not motivated by racial prejudice or guided by stereotypical assumptions about persons of colour or migrant workers. Others may focus on my finding that the decision to seek DNA samples from all migrant workers of colour, regardless of their physical

characteristics, could well have had an impact on the migrant workers' sense of vulnerability, lack of security and fairness.

Both perspectives have validity. But ultimately, the findings give context to important recommendations designed to promote effective, bias-free policing and enhance police-community relations, particularly with those who are vulnerable. I believe that is the common goal of every stakeholder who participated in this systemic review. And for that, I am grateful.



Appendices

APPENDIX A

Systemic Review of OPP Practices for Voluntary DNA Sampling

Terms of Reference

The review will examine the following:

- OPP policies, procedures, standards and practices as they relate to obtaining voluntary DNA samples from specific groups of individuals during investigations
- Processes used by the OPP to investigate cases that rely on DNA evidence, including sexual assaults
- Supervision of the investigative process through the OPP command structure and direction given for processes

- OPP policies, procedures and practices relating to racial profiling and the Canadian Charter of Rights and Freedoms
- Training provided to OPP officers regarding investigative policing standards, obtaining DNA samples on a voluntary basis, racial profiling and the Canadian Charter of Rights and Freedoms
- Case law, reports, reviews, articles and documents relating to gathering DNA samples, voluntary participation in that process, racial profiling in relation to DNA collection and privacy issues surrounding the voluntary provision of DNA
- The level and type of police involvement with employers in relation to employee participation in police investigations, and specifically pertaining to employers of migrant workers

APPENDIX B

Draft Policy Discussion Paper and Draft Policy

November 23, 2015

Discussion Paper Issued for OIPRD Roundtable on Draft DNA Sweep Policy

As you know, the OIPRD is convening a roundtable discussion with stakeholders in connection with its systemic review of police practices, procedures and protocols concerning DNA sweeps. The Roundtable will take place on November 30, 2015, from 2 p.m. – 4 p.m. at the OIPRD offices at 655 Bay St., Toronto, ON 10th Floor. Those attending the roundtable are requested to sign in with reception upon arrival at the OIPRD.

The Director's final systemic review report will identify the issues raised by interested parties and, most importantly, make recommendations. One likely recommendation is that the OPP, and similarly situated police services in Ontario, develop a policy to govern how and when DNA sweeps are conducted. There is no existing OPP policy that governs how and when DNA sweeps are to be conducted. Even when a DNA sweep is conducted in good faith, it must recognize the potential vulnerabilities of the community which is the subject of the sweep, and proactively address those vulnerabilities and negate perceptions of racial profiling or stereotypical thinking while not compromising the effectiveness of the investigation.

Put another way, policing relies heavily on public acceptance and a shared commitment for justice. It is important that policing not only be free from racism and discrimination, but be perceived as such by the community. That is why, in this context, it may be crucial that a policy be created by the OPP and similarly situated police services to identify and ensure best practices.

What follows is a draft policy for discussions purposes. In the final report, recommendations will be accompanied by commentary. We have provided an example of the type of commentary that might be included in a final report.

At the roundtable, counsel for the Director will provide a brief overview of the draft policy, and what prompted its content and wording. We will then facilitate a discussion not only of the draft policy, but of other

recommendations that might be contemplated in a final report. Your input is important.

The roundtable may include representatives from the following organizations: the Canadian Civil Liberties Association, the Ontario Human Rights Commission, the African Canadian Legal Clinic, the Metro Toronto Chinese and Southeast Asian Legal Clinic, Justicia for Migrant Workers, Migrant Worker’s Alliance for Change, the Criminal Lawyers Association, the OPP, and Toronto Police Service.

This draft is for discussion purposes only and not intended for wider dissemination beyond your organizations at this time. We look forward to seeing everyone at the roundtable.

The Draft Policy

The policy adopted by the OPP and similarly situated police services should conform to or be guided by the draft policy immediately below.

Preamble

1. This policy outlines best practices in connection with “DNA sweeps.” Members of the police service are expected to be guided by, and comply with, the best practices identified in this policy, absent special circumstances.
2. A “DNA sweep” refers to the police investigative tool of seeking to obtain a DNA sample from a group of individuals without reasonable grounds or suspicion to believe that any particular individual within the group is the perpetrator. The group of individuals may be identified based on potential access to a crime scene or more typically, upon characteristics, such as race, shared with the perpetrator.
3. In deciding whether a DNA sweep will be conducted, and if conducted, how it will be conducted, investigators should be mindful, among other things, of the following:
 - a. DNA sweeps involve the expenditure of substantial human and financial resources both by police services and forensic laboratories

- b. The identification of a group of individuals based on race or colour or analogous identifiers may reinforce the impression that the police are stereotyping people of a certain identifiable group, and as a consequence, create or exacerbate tensions between the community and police that community policing and other initiatives are designed to overcome
- c. DNA sweeps must be conducted in ways that are compliant with existing law, including the requirement that DNA samples be obtained from individuals, absent a court order or probable grounds, based on their informed and voluntary consent
- d. Some groups of individuals are particularly vulnerable based, for example, on the nature of their employment or status in Canada, requiring heightened sensitivity by police to how their informed and voluntary consent should be obtained
- e. Absent special circumstances, the retention of DNA samples of individuals cleared of involvement in the crime under investigation by DNA testing or other investigative work undermines the rights of those who voluntarily provide such samples

Best practices

- 4. The following best practices should guide decisions as to whether and how a DNA sweep should be conducted, and what steps should follow the completion of the investigation:
 - a. Given the costs (both in the expenditure of resources and in police-community relations) associated with DNA sweeps, they should not be used as an investigative tool, absent special circumstances, unless (i) there is a reasonable prospect that they will further the investigation in a meaningful way and (ii) the seriousness of the offence under investigation justifies the associated costs.
 - b. In determining whether there is a reasonable prospect that a DNA sweep will further the investigation in a meaningful way, the police should consider, among other things: (i) how many individuals might reasonably be regarded as falling within the class of potential perpetrators and whether the number of such individuals can even

- be determined; (ii) the specificity or lack thereof of any description of the perpetrator; (iii) the extent to which the police have access to all or the vast majority of those individuals who might reasonably be regarded as falling within the class of potential perpetrators; and (iv) the availability of alternative investigative techniques.
- c. The group of individuals whose DNA will be requested pursuant to a DNA sweep must share the characteristics of the perpetrator, as determined by the investigation. Reasonable allowance can be made, in this regard, for the imprecision in eyewitness descriptions of the perpetrator.
 - d. Police should protect the privacy of donors and those who exercise the right not to provide DNA voluntarily. This means, among other things, that (i) an individual's decision whether to provide a DNA sample should not be unnecessarily shared with the individual's employer or third parties unrelated to the investigation; and (ii) requests for voluntary DNA samples should be made by the police, to the extent reasonably practicable, in private.
 - e. Any consent to provide a DNA sample must be informed and voluntary. This means, among other things, that (i) the police should advise the individual that he or she is not required to provide a DNA sample; (ii) the police should not advise the individual that they can obtain a warrant to secure the DNA sample if it is not provided voluntarily; (iii) the police should not coerce or threaten the individual to obtain a DNA sample; (iv) absent exigent circumstances, the police should advise the individual that he or she may retain or consult a lawyer prior to deciding whether to provide a DNA sample voluntarily; (v) the police should advise the individual how any DNA sample will be taken and by whom; (vi) the police should advise the individual what use will potentially be made of the DNA sample and what will be done with the DNA sample once the investigation is completed.
 - f. Consents should be obtained in writing. The written consent should accurately reflect, in plain language, among other things: (i) the fact that the individual is not required to provide a DNA sample; and (ii) the use that will potentially be made of the DNA sample and what will be done with the DNA sample once the investigation

is completed. Absent exigent circumstances, the consent should specifically reflect that the DNA sample will only be used for the purposes of the subject investigation and for no other purposes and that it will not be retained if, as a result of DNA testing or other investigative work, the individual is cleared as a suspect in the subject investigation.

- g. Absent exigent circumstances, police should not seek the consent of an individual to providing a DNA sample for purposes unrelated to the subject investigation. If the police wish to use the DNA sample for purposes unrelated to the subject investigation, this must be explained to the individual and reflected in the written consent.
- h. Where the group of individuals whose DNA is being sought is a vulnerable group by reason of the nature of their employment, status in Canada or analogous circumstances, the police should involve, if reasonably practicable, community based organizations which represent the group's interests to facilitate access by group members to legal advice.
- i. When an individual who has given a voluntary DNA sample is cleared as a suspect in the subject investigation, the individual should be notified, if possible, of that fact, either forthwith or as soon as reasonably practicable thereafter if notification forthwith could reasonably compromise the ongoing investigation. Such notification should either be in writing or, at the very least, contemporaneously recorded by police.
- j. No DNA sample provided voluntarily by an individual pursuant to a DNA sweep should be retained by any criminal justice agency, including but not limited to the applicable police service and the forensic laboratory which analyzed the sample, where the individual has been cleared as a suspect in the subject investigation. The disposal of such sample should take place as soon as reasonably practicable. The individual should be notified, if possible, of the disposal of the DNA sample as soon as reasonably practicable after the disposal has taken place.
- k. The police should purge all records and identifiable information pertaining to the individual who has been cleared as a suspect in

the subject investigation except to the extent such records and identifiable information need to be maintained to document the subject investigation.

- I. Where the group of individuals that is targeted by a DNA sweep is vulnerable or where the DNA sweep could create the perception of racial profiling or stereotypical thinking, the police should proactively work with community based organizations to address these issues, reduce misunderstandings, and enhance police-community relations.

Illustration of Draft Commentary on the Proposed Policy

Paragraph 2 contains a definition of a DNA sweep. The most important aspect of the definition is that the police need not have reasonable grounds or suspicion that a particular individual within the group is the perpetrator. This is consistent with Canadian jurisprudence that permits DNA samples to be taken from individuals in the absence of reasonable grounds or suspicion based on the donor's informed and voluntary consent.

Paragraph 3 articulates factors that should inform an investigative decision as to whether a DNA sweep will be conducted and, if conducted, how it will be conducted. The first two factors address the "costs," in the broadest sense, associated with DNA sweeps. DNA sweeps involve the expenditure of substantial human and financial resources both by police services and forensic laboratories. The identification of a group of individuals based on race, colour or analogous identifiers may reinforce perceptions of stereotyping by the police and exacerbate tensions in the community.

These concerns are captured in Walker, S., & Harrington, M., Police DNA "Sweeps": A Proposed Model Policy on Police Requests for DNA Samples (July 2005). As part of a University of Nebraska initiative, the authors developed a model policy on the use of DNA sweeps. The State of Nebraska ultimately legislated in this area. The authors said this on the issue of costs:

Given the strong evidence about ineffectiveness [of DNA sweeps] as an investigative tool, they represent a serious waste of resources. The most serious waste involves the inefficient use of police officer time. The collection of large numbers of DNA samples also overloads forensic laboratories... It is a serious mistake, therefore, to further

burden laboratories with additional samples arising from sweeps that are highly unproductive. Tests are also expensive, and consequently impose a dollar cost on already financially strapped agencies.

DNA sweeps also impose costs on communities affected and on police-community relations. Particularly in African American and Hispanic communities, they reinforce the impression that the police are stereotyping people of color, and as a consequence aggravate long-standing tensions that community policing and other efforts are designed to overcome.” Pp. 5

The literature certainly supports, at least anecdotally, in the United States and in Canada some high-profile failures associated with the use of DNA sweeps. As well, it is obvious that DNA sweeps do involve the expenditure of valuable human resources. We know that the Centre of Forensic Sciences is severely taxed with requests that it must prioritize for DNA and other forensic testing. The literature also supports, particularly in the United States, the concern that DNA sweeps targeting members of a racialized community can elevate police-community tensions.

The draft policy does not purport to restrict DNA sweeps based on the costs associated with them, but ensure that decision-makers are mindful of these costs when structuring their investigations. If, for example, the group of individuals which might include the perpetrator is so broad that a successful DNA sweep is unlikely, the costs associated with the undertaking should figure prominently in whether the sweep should even take place.

The third and fourth factors contained in paragraph six relate to the issue of informed and voluntary consent. The legality of a DNA sweep will be largely dependent on whether DNA was obtained pursuant to truly informed and voluntary consents. Some groups of individuals are particularly vulnerable based on their employment situation or status in Canada. Police must be mindful of such vulnerabilities when deciding how consents will be sought and obtained.

This is not to be regarded as some “indulgence” for some members of the community, and not others. Nor can it fairly be regarded as undermining the efficacy of the police investigation. On the contrary, it simply recognizes, as does existing jurisprudence, that a determination whether a truly informed and voluntary consent was obtained is fact specific. An employer asked to consent will likely be differently situated than a migrant worker asked to consent in the presence of that employer.

The final factor relates to the retention of DNA samples of those cleared of involvement. Again, the design of a DNA sweep must consider, from the start, what will be done with DNA samples and how that will be communicated to those involved.

Other recommendations might include the following. These are not intended to be exhaustive:

Recommendation:

Training should be offered both by the Ontario Police College and by applicable police services as to the policy on DNA sweeps. Such training should include:

- (a) the factors that should inform whether a DNA sweep is conducted and, if conducted, how it should be conducted
- (b) best practices and why they constitute best practices
- (c) the law respecting informed and voluntary consents
- (d) case examples as to how a DNA sweep may be structured to conform to best practices
- (e) some basic understanding of the vulnerabilities of certain groups, such as migrant workers and the racialized community, and how those vulnerabilities should be considered in designing an investigation and in promoting understanding between the police and affected communities

Destruction of DNA Samples

Recommendation:

The Ontario Provincial Police should publicly report, within 120 days of release of this report, on:

- (a) whether all DNA samples taken from individuals other than the perpetrator, have been destroyed and what, if any steps, have been taken to so inform those affected
- (b) what steps will be taken to inform those affected (if such steps have not been taken to date) that the DNA samples have been or will be destroyed

The Report shall not include information that might lead to the identification of individuals whose DNA was taken.

The Consent to Provide Biological Samples

Recommendation:

The Ontario Provincial Police, the Ministry of Community Safety and Correctional Services and the Ministry of the Attorney General should re-evaluate, in accordance with this Report, the content of the Consent to Provide Biological Samples.

Thank you in advance for your participation and ongoing interest in the issues identified in this systemic review.

APPENDIX C

Organizations that Participated in or Made Submissions to the Policy Roundtable

African-Canadian Legal Clinic
Canadian Civil Liberties Association
Criminal Lawyers' Association
Justicia for Migrant Workers
Metro Toronto Chinese and Southeast Asian Legal Clinic
Migrant Workers Alliance for Change
Ministry of the Attorney General Crown Law Office – Criminal
Niagara Regional Police Service (Chief McGuire)
Ontario Human Rights Commission
Ontario Provincial Police
Peel Regional Police Service (Chief Evans)
Toronto Police Service
Waterloo Regional Police Service (Chief Larkin)
Windsor Police Service (Deputy Chief Derus)

We are also grateful to the Centre of Forensic Sciences. Although it did not make formal submissions, it provided the review with much-needed information about the processes in place.



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