



# CASTING THE NET

A Review of Ontario Provincial Police Practices for DNA Canvasses

# Executive Summary and Recommendations

## 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 Doe<sup>1</sup> lived alone on one of those roads.

At about 9 p.m. on October 19, 2013, she stepped onto her porch to have a cigarette. 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. 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 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.

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

She called the Ontario Provincial Police (OPP) nonetheless. She described her attacker as one of the migrant workers brought in to harvest the crops. He 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. 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,<sup>2</sup> questions were raised about how the investigation had been conducted. Police decided that DNA samples would be requested from virtually every migrant worker in the vicinity. This investigative tool is known in Canada as a "DNA canvass." The migrant workers were all men of colour. The fact that the DNA canvass targeted only migrant workers of colour raised 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 consent. Important questions were also 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 had no connection to the crime. These and other concerns were reflected in a complaint filed with the Office of the Independent Police Director (OIPRD) by Justicia for Migrant Workers, and in submissions from various stakeholders in support of the complaint.

The Independent Police Review Director (Director) concluded that these important questions were best addressed through a systemic review of the OPP policies, procedures, standards and practices for conducting DNA canvasses and obtaining DNA on consent from vulnerable groups during criminal investigations. Section 57 of the Police Services Act gives the 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. It reviewed officers' notes and statements, minutes of meetings, occurrence reports, audio and video recordings of interviews, completed consent forms and questionnaires, photographs, forensic

<sup>2</sup> Cooper refused to provide a DNA sample voluntarily. So the police obtained his discarded DNA, leading to his identification as the perpetrator.

evidence, OPP policies, procedures, practices and training materials. The OIPRD requested and received extremely helpful submissions from stakeholders and members of the public. The OIPRD also examined relevant jurisprudence and literature from inside and outside Canada. It also conducted a roundtable to obtain feedback from a number of stakeholders on potential recommendations for change. A draft Policy on DNA Canvassing was also distributed to many stakeholders, including a number of Ontario police services other than the OPP, for their feedback. All of the contributing stakeholders are identified in the Director's Report. They made an invaluable contribution to the review.

## PRE-EXISTING 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 between the police and those whose DNA is requested, 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. 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. These criticisms have led to submissions, in Canada and the United States, that DNA canvassing not be permitted without prior judicial authorization, or be substantially narrowed or modified. The Director's recommendations directly address these and other concerns.

## SUMMARY OF FINDINGS

For the reasons reflected in his Report, the Director was 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 a thorough 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. The Director took 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. The Director recognized 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 frailties of eyewitness descriptions meant that investigators could reasonably assume that features of Ms. Doe's description might not be accurate. As well, the police were under severe time constraints since the migrant workers were seasonal workers who were scheduled to leave Canada shortly. That 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. For example, 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 to 328 lbs. Five men were described as East Indian.

OPP investigators maintained that the breadth of DNA canvassing was appropriate since the perpetrator left items (shoelaces and a strip of clothing) at the crime. 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 the Director's view, this belief, while 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, the Director would have expected the police to take other investigative steps when interviewing the workers.

While the Director was 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 the Report, could have alleviated or reduced concerns about racial profiling.

The Director also concluded 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. 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. Their permits are tied to specific employers and they have very limited workplace mobility. 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 the employment protections available to other Canadian workers. 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.

The role played by the farm owners and their staff, although well-intentioned, also contributed to concerns about whether all of the consents obtained were truly voluntary. As well, the investigation failed to adequately take measures to ensure, to the extent possible, that decisions by workers not to provide DNA samples remained confidential, especially from their employer. In fairness, the OPP did take significant steps to attempt to ensure that individual consents were informed and voluntary. Its officers also showed good faith and professionalism in their interactions with individual workers.

The Director's 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. The Director concluded 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 the Director's 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.

## ORGANIZATION OF THE DIRECTOR'S REPORT

Chapter one provides an overview of the background and circumstances that led to this

systemic review. Chapter two details the OPP investigation that took place. Chapter three outlines the submissions made by the various stakeholders who assisted the Director in this process. Chapter four sets out the relevant legislation and the historical background to the issue of DNA canvassing in Canada and elsewhere. It similarly addresses how DNA samples of cleared individuals are to be dealt with. Chapter five contains the Director's analysis and findings. Chapter six contains the Director's recommendations, including a proposed Model Policy on DNA Canvassing for all police services across Ontario. Included is a detailed commentary on the recommendations, including a discussion of the feedback from a variety of stakeholders on the proposed model policy. Chapter seven contains a brief conclusion.

## CONCLUSION

The Director's conclusion was as follows:

*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.*

*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.*

## RECOMMENDATIONS

### RECOMMENDATION 1:

The OPP must develop a policy to govern how and when DNA sweeps 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.

## THE POLICY

### RECOMMENDATION 3:

The policy adopted by the OPP and similarly situated police services should conform to, or be guided by, the Model Policy 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.<sup>3</sup> 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.

### *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:

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<sup>3</sup> 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.

- 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.

## 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 racialized communities, 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 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 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.

## **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.



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