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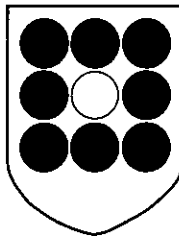

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April 23, 2014

Systemic Review of OPP DNA Sampling
Office of the Independent Police Review Director
655 Bay Street, 10th Floor
Toronto ON M7A 2T4

Dear Director McNeilly,

We are writing to you on behalf of the Canadian Civil Liberties Association (CCLA) with respect to your ongoing systemic review into the Ontario Provincial Police's (OPP) practices for voluntary DNA sampling.

The Canadian Civil Liberties Association 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. CCLA has developed a unique model of advocacy that supports five core activities: public education, civic engagement, monitoring, research and litigation. Currently, CCLA's work is focused on the following thematic areas: Fundamental Freedoms, Public Safety, National Security and Equality and Anti-discrimination.

Both racial profiling as well as the collection, use, disclosure and retention of DNA by Canadian law enforcement are issues of serious concern to CCLA. CCLA's Youth Rights and Policing (YRAP) project has for a number of years been involved in a variety of activities including meetings with youth to discuss policing issues, information sessions to inform youth of their rights, and youth empowerment. The main focus of these activities has been racial profiling of youth by police. In addition, CCLA has been actively involved in a series of meetings convened by the Toronto Police Services Board (TPSB) and discussions to address carding and racial profiling by Toronto Police. In the past two years, CCLA has made numerous submissions on these matters to the TPSB, including submissions this past month concerning a proposed draft TPSB policy. With respect to privacy rights and DNA testing, we have been involved in numerous court cases and public policy discussions regarding DNA and law enforcement, and have specifically questioned police tactics of DNA collection sweeps on a 'voluntary' basis in the past. In 2011 CCLA wrote to both the OPP and the Ontario Information and Privacy Commissioner to express our concerns about these practices. In 2014, CCLA made a presentation on Genetic Privacy and Civil Liberties at a conference funded by the Office of the Privacy Commissioner of Canada.

We were deeply concerned when we learned about the allegations underlying this systemic review, namely that the 'voluntary' DNA sampling of dozens of migrant workers who, except for their skin colour, did not match the description of the suspect. Upon learning of these allegations, we undertook to gather more information about the facts and issues raised. We have been in contact with the complainants to remain apprised of developments. We also issued a public statement expressing our concerns.[1] The following submissions are informed by our work in the areas of public safety, privacy and equality.

We submit that racial profiling in the form of a police action targeting a large group of people, based exclusively on the colour of their skin, as alleged, and on the basis of their immigration status, constitutes discrimination contrary to the *Canadian Charter of Rights and Freedoms* and the Ontario *Human Rights Code*. It is our view that the practice of 'voluntary' DNA sweeps that target a large number of people are inherently coercive – a conclusion that is particularly true 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. Based on our understanding of OPP policies and the facts as alleged in the migrant workers' complaint, we believe that individuals' section 8 *Charter* rights were violated in this instance. Further, no matter the precise legal limits of DNA collection, use and retention, these tactics cannot be deployed in a discriminatory manner. Indeed, targeting a vulnerable, marginalized group in a manner that violates their s. 8 *Charter* rights doubly victimizes the targeted individuals. This creates a compound rights infringement and a particularly serious infringement of privacy rights and the right to be free from discrimination.

### 1. *Factual Background*

The allegations underlying the complaint include the following:

- Following a sexual assault in Bayham, Ontario, the victim provided a suspect description to police. One of several elements in the suspect description was the suspect's race; the suspect was described as black.
- Elgin County OPP approached migrant workers on a number of farms known to employ Caribbean workers through the Seasonal Agricultural Worker Program (SAWP). The workers were asked to enter a police cruiser, to sign a "waiver," and to provide DNA at a nearby police van.
- All black and brown migrant workers (presumably on these farms) were approached in this manner, regardless of whether they matched the various elements of the suspect description.
- Many of the targeted individuals did not match the suspect description in one or more ways (such as age, height and facial hair).

[1] CCLA, "CCLA concerned about DNA testing of Migrant Workers" (December 13, 2013), online at http://ccla.org/2013/12/13/ccla-concerned-about-dna-testing-of-migrant-workers/.

- While the majority of those targeted had no concerns about the police's demeanor towards them, they were nonetheless distressed by the experience; felt targeted because of their race; and felt that they had to comply with the DNA collection request.
- Despite concerns by many of the migrant workers about the DNA sweep, the majority of them were reluctant to come forward with a police complaint.

### *2. The Unique Vulnerability of Migrant Workers*

The OPP action in Elgin County targeted a particularly vulnerable group of individuals: migrant workers recruited under the Seasonal Agricultural Worker Program (SAWP).[2] Migrant farm workers are heavily dependent on their employers for their income, their status in Canada, and even their housing. They face significant barriers to asserting their rights, seeking better working conditions, and reporting exploitation or abuse. As such, migrant workers are particularly vulnerable to coercive measures.

The Supreme Court of Canada has recognized the unique vulnerability of individuals who are employed as agricultural workers. As the Court noted in 2001:

> Distinguishing features of agricultural workers are their political impotence, their lack of resources to associate without state protection and their vulnerability to reprisal by their employers; as noted by Sharpe J [at trial], agricultural workers are "poorly paid, face difficult working conditions, have low levels of skill and education, low status and limited employment mobility."[3]

Migrant workers under the SAWP face additional challenges. As an Ontario taskforce recently noted: "Low-skilled temporary foreign workers are among Canada's most vulnerable individuals when it comes to abuse and poor conditions in the workplace."[4] The taskforce highlighted several factors that prevent such workers from knowing and asserting their rights. These include the risk of reprisals and deportation, language barriers, lack of experience with the Canadian legal system, and misleading employer-provided information.[5] Migrant workers are often socially isolated, cut off from support services, and ill-informed about their rights under Canadian law.[6]

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[2] We understand that the Elgin County OPP conducted their DNA sweep on farms known to hire foreign workers through the SAWP. Administered by the federal government, the SAWP allows employers to employ temporary farm workers from Mexico and participating Caribbean countries, including Jamaica and Trinidad and Tobago. Agricultural workers under the SAWP are entitled to work in Canada for a specific employer for a maximum of eight months each year. See Employment and Social Development Canada, "Hiring Seasonal Agricultural Workers," online at http://www.esdc.gc.ca/eng/jobs/foreign_workers/agriculture/seasonal.

[3] *Dunmore v Ontario (Attorney General)*, 2001 SCC 94 at para 41.

[4] *Expanding Our Routes to Success: The Final Report by Ontario's Expert Roundtable on Immigration* (September 2012) at page 30, online at http://www.citizenship.gov.on.ca/english/keyinitiatives/imm_str/roundtable/roundtable.pdf.

[5] *Ibid.*

[6] According to a 2012 report, "Among the most common complaints that migrant workers raise are that they do not know what their rights are when they arrive in Ontario; they do not know how to find out what their rights are; and they do not know what organizations are available to assist them." Fay Faraday, *Made in Canada: How the*

Moreover, SAWP workers are issued "closed work permits," which are specifically tied to one particular employer. These closed work permits are one of the primary causes of worker vulnerability, as workers are unable to change employment to seek different working conditions.[7] Indeed, if the employer terminates the contract for sufficient reason, SAWP workers must immediately return to their home countries. As the Law Commission of Ontario explained in a recent report:

> For low skilled temporary migrant workers, keeping their job is essential to their limited immigration status in Canada. There are high stakes associated with job loss – their ejection from Canada, the need to find a job in their home country (which will pay a fraction of what they were earning in Ontario), the consequences for their family income, and the likelihood that they will not be accepted back into Canada... Therefore, these workers experience a particular brand of job insecurity that may discourage them from exercising their legal rights.[8]

The Law Commission of Ontario found that many workers greatly fear losing their jobs and being repatriated back to their home countries.[9] This makes migrant workers particularly vulnerable to exploitation, and discourages them from filing complaints when their legal rights (including employment and housing standards) are violated.[10] As such, it is understandable that the migrant workers targeted by the Elgin County OPP were unwilling to identify themselves for the purposes of an OIPRD complaint, even though many were concerned about the DNA sweep.

Finally, many low-skilled temporary foreign workers depend on their employers for housing. Indeed, employment contracts under the SAWP require employers to provide "clean, adequate living accommodations," without charging the temporary foreign workers.[11] This only deepens workers' dependence on their employer – and creates yet another barrier preventing migrant workers from asserting their legal rights. In this context, requests from authority figures (including employers and police) may be experienced as particularly coercive.

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*Law Constructs Migrant Workers'* Insecurity (Summary Report), Metcalf Foundation (September 2012), online at http://metcalffoundation.com/publications-resources/view/made-in-canada.

[7] *Ibid.* See also Marie Carpentier, *La discrimination systémique à l'égard des travailleuses et travailleurs migrants*, Commission des droits de la personne et des droits de la jeunesse du Québec (December 2011), online at http://www.cdpdj.qc.ca/publications/Avis_travailleurs_immigrants.pdf.

[8] Law Commission of Ontario, *Vulnerable Workers and Precarious Work* (Toronto: December 2012) at page 25 (emphasis added), online at http://www.lco-cdo.org/en/vulnerable-workers-final-report.

[9] *Ibid* at page 70.

[10] See *Monrose v Double Diamond Acres Limited*, 2013 HRTO 1273 at para 11: "[A]s 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."

[11] See, for example, Employment and Social Development Canada, "Agreement for the Employment in Canada of Commonwealth Caribbean Seasonal Agricultural Workers – 2014," online at http://www.esdc.gc.ca/eng/jobs/foreign_workers/agriculture/seasonal/sawpcc2014.pdf. By contrast, employers are not required to provide housing for other agricultural workers who are not recruited under the SWAP. See Foreign Agricultural Resource Management Services, "SAWP vs NOC C & D (Low Skill Agriculture) Comparison," online at http://www.farmsontario.ca/lowskill.php.

### 3. *Racial Profiling*

Racial profiling is a form of racial discrimination that may result from a deliberate, intentional act against a racialized individual or group – or may result from unconscious prejudices that unfortunately exist among many members of society, and/or as the result of systemic bias. In a recent case, the Ontario Court of Appeal endorsed previous decisions recognizing the existence of racial profiling as a phenomenon in Canada, and confirmed the following propositions:

1) The prohibited ground or grounds of discrimination need not be the sole or the major factor leading to the discriminatory conduct; it is sufficient if they are a factor.
2) There is no need to establish an intention or motivation to discriminate; the focus of the enquiry is on the effect of the respondent's actions on the complainant.
3) The prohibited ground or grounds need not be the cause of the respondent's discriminatory conduct; it is sufficient if they are a factor or operative element.
4) There need be no direct evidence of discrimination; discrimination will more often be proven by circumstantial evidence and inference.
5) Racial stereotyping will usually be the result of subtle unconscious beliefs, biases and prejudices.[12]

Given that racial profiling is a form of racial discrimination, there is no question that it is prohibited both under the Ontario *Human Rights Code* and the *Charter*'s equality guarantee in section 15(1).

Racial profiling by police exacts a serious toll on the communities and individuals it affects – particularly those touched by repeated, systemic racial discrimination. Binnie J explained in *R v Grant,* in the context of neighbourhood policing: "A growing body of evidence and opinion suggests that visible minorities and marginalized individuals are at particular risk from unjustified "low visibility" police interventions in their lives."[13] The Ontario Human Rights Commission has found that racial profiling creates a sense of mistrust, alienation and fear among those affected. Individuals singled out for heightened scrutiny solely because of their race report feeling dehumanized and humiliated.[14]

It is alleged that the Elgin County OPP singled out a group for detention, investigation and heightened scrutiny (through the coercive request for a highly invasive DNA test). The OPP's actions were based on the group members' race and immigration status – to the exclusion of other, more relevant factors such as whether the individuals matched the suspect description. No subtle analysis is necessary: this was clearly a situation of racial profiling. As such, the OPP actions (as alleged) would constitute unlawful and unconstitutional discrimination.

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[12] *Pieters v Peel Law Association*, 2013 ONCA 396 at para 111.

[13] *R v Grant*, 2009 SCC 32 at para 154, per Binnie J (partially concurring).

[14] Ontario Human Rights Commission, *Paying the Price: The Human Cost of Racial Profiling* (2003), online at http://www.ohrc.on.ca/sites/default/files/attachments/Paying_the_price%3A_The_human_cost_of_racial_profiling.pdf.

### 4. *Privacy Concerns Regarding OPP Voluntary DNA Collection and Retention Practices*

***Legal Framework***

The Supreme Court has ruled that the collection of bodily samples involves "state interference with a person's bodily integrity and is a breach of a person's privacy and an affront to human dignity."[15] The Court has described DNA in particular as containing "undoubtedly the highest level of personal and private information."[16] In part because of its uniquely personal and private nature, DNA evidence is often crucial to law enforcement, prosecution efforts and the administration of justice. In order to recognize and allow for legitimate law enforcement uses while still safeguarding individual privacy, police collection, retention and use of DNA must be subject to close scrutiny, oversight and control. As the Supreme Court stated in *R v Rogers*:

> There is no question that DNA evidence has revolutionized the way many crimes are investigated and prosecuted. The use of this new technology has not only led to the successful identification and prosecution of many dangerous criminals, it has served to exonerate many persons who were wrongfully suspected or convicted. The importance of this forensic development to the administration of justice can hardly be overstated. At the same time, the profound implications of government seizure and use of DNA samples on the privacy and security of the person cannot be ignored. A proper balance between these competing interests must be achieved within our constitutional framework.[17]

At a minimum, police procedures must comply with section 8 of the *Canadian Charter of Rights and Freedoms* and the applicable provincial privacy legislation.

Section 8 of the *Charter* protects individuals from unreasonable search and seizure. The Supreme Court has held that, for a search to be reasonable, (a) it must be authorized by law; (b) the law itself must be reasonable; and (c) the manner in which the search was carried out must be reasonable.[18] Reasonableness is a contextual assessment that will take into account "both the importance of the state objective and the degree of impact on the individual's privacy interest."[19] The *Freedom of Information and Protection of Privacy Act* (FIPPA) also restricts the way in which the Ontario Provincial Police may collect, retain, use and disclose personal information.[20]

Canadian courts and the Ontario Information and Privacy Commissioner have both examined the constitutional and statutory legality of voluntary DNA sweeps. These analyses primarily turn on whether DNA collection was truly voluntary, whether fully informed consent was given, and whether there are sufficient safeguards and protections regarding the manner in which DNA is treated after the initial

[15] *R v Stillman*, [1997] 1 SCR 607 at para 42.
[16] *R v SAB*, [2003] 2 SCR 678 at para 48.
[17] *R. v. Rodgers*, [2006] 1 S.C.R. 554, 2006 SCC 15 at para 4.
[18] *R. v. Collins*, [1987] 1 SCR 265 at p 278; *R. v. Stillman*, [1997] 1 SCR 607 at para 25
[19] *R. v. Rodgers*, [2006] 1 S.C.R. 554, 2006 SCC 15 at para 27.
[20] *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F.31.

collection. Because compliance with provincial privacy statutes largely hinges on the broader legality of the underlying police action, we will primarily address the *Charter* limitations on this police practice. It should be remembered, however, that police collection of personal information that violates the *Charter* will also violate *FIPPA*.[21]

***The Meaning of Consent***

The Ontario Court of Appeal has analyzed the meaning of consent in the voluntary DNA sampling context. In order for a waiver of section 8 rights to be valid, the Crown must establish six factors:

> (i) There was a consent, express or implied;
>
> (ii) The giver of the consent had the authority to give the consent in question;
>
> (iii) The consent was voluntary in the sense that that word is used in *Goldman* [1979 CanLII 60 (SCC), [1980] 1 SCR 976] and was not the product of police oppression, coercion or other external conduct which negated the freedom to choose whether or not to allow the police to pursue the course of conduct requested;
>
> (iv) The giver of the consent was aware of the nature of the police conduct to which he or she was being asked to consent;
>
> (v) The giver of the consent was aware of his or her right to refuse to permit the police to engage in the conduct requested, and
>
> (iv) The giver of the consent was aware of the potential consequences of giving the consent.[22]

All of these conditions must be complied with in order for a consensual waiver of privacy rights to be valid. Court cases have examined in particular whether or not the individual was made aware of his or her right to refuse and the full extent of the potential consequences of giving the consent. Individuals should also be informed of their right to counsel prior to giving their consent, and have the ability to place restrictions on how the DNA sample can be used by the police.

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[21] Under s. 38(2) of FIPPA government bodies may collect personal information if it is "used for the purposes of law enforcement." The Ontario Information and Privacy Commissioner has determined that this exception is applicable if the collection of personal information is to be used either "in a specific investigation or inspection that leads or could lead to a proceeding in a court-or tribunal if a penalty or sanction could be imposed in the proceeding" or "by police acting within the scope of their law enforcement powers." For either of these to apply, however, police must be acting within the scope of their legal powers. This includes compliance with the *Charter*. See also *FIPPA* s. 2 (defining "law enforcement); Investigation I93-084P, Ontario Human Rights Commission, [1994] O.I.P.C. No. 441, pp 2-3; Investigation I94-048M, A Regional Police, [1994] O.I.P.C. No. 428, pp. 2-3; and Investigation I96-032M, A Regional Police Services Board, [1996] O.I.P.C. No. 348, p. 4.

[22] *R. v. Nicholas*, 2004 CanLII 13008 (ON CA) at para. 48; *R. v. Wills* 1992 CanLII 2780 (ON CA), (1992), 7 O.R. (3d) 337, 70 C.C.C. (3d) 529 (C.A.).

Although we have not examined the current consent forms and standard operating procedures used by the OPP, these legal requirements have been in place for some time. Any deviation from these basic informational requirements would be clearly unacceptable.

It is CCLA's view that the third factor, voluntary consent, is particularly crucial to assessing the facts that gave rise to this systemic review. The Supreme Court elaborated on the meaning of voluntary consent in *Goldman* as follows:

> The consent given under s. 178.11(2)(a) must be voluntary in the sense that it is free from coercion. It must be made knowingly in that the consenter must be aware of what he is doing and aware of the significance of his act and the use which the police may be able to make of the consent. . . . A consent under s. 178.11(2)( a) is a valid and effective consent if it is the conscious act of the consenter doing what he intends to do for reasons which he considers sufficient. If the consent he gives is the one he intended to give and if he gives it as a result of his own decision and not under external coercion the fact that his motives for so doing are selfish and even reprehensible by certain standards will not vitiate it.[23]

This passage has been cited by the Ontario Court of Appeal with approval in the context of voluntary DNA collection. The Court has explained that "[w]here constitutionally protected privacy rights are concerned, no lesser form of consent than that described in *Goldman* and *Rosen* should suffice."[24]

The notion of "voluntary consent" in police DNA sweeps is problematic. While some individuals may be willing to provide samples in a DNA collection sweep, many others will understandably not wish to turn over highly personal and sensitive genetic information about themselves, in the absence of individualized suspicion or an evidence-based investigation against them that involves more than the colour of their skin. Indeed, multiple individuals who have been requested to provide DNA during past sweeps have contacted our organization to complain that, in the circumstances, they did not feel that they truly had a choice to decline the police request. In CCLA's view, it is inherently coercive to "ask" innocent individuals to hand their DNA over to the state, particularly when police indicate that the public has a "moral obligation" to cooperate in the investigation and that individuals with "nothing to hide" are expected to comply.

The fact that DNA sweeps are coercive is based, in part, on the concern people have that they may experience law enforcement reprecussions if they do not comply. Innocent people who assert their privacy rights may be perceived to be guilty and targeted for further investigation simply due to the assertion of their constitutional rights. As the Supreme Court has recently stated,

> ... the exercise of Charter rights, such as the right to remain silent or to walk away from questioning made outside the context of a detention, [should not] provide grounds for reasonable suspicion. These rights

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[23] *R. v. Goldman*, 1979 CanLII 60 (SCC), [1980] 1 S.C.R. 976 at p. 1005.
[24] *R. v. Wills*, 1992 CanLII 2780 (ON CA).

become meaningless to the extent that they are capable of forming the basis of reasonable suspicion. Individuals should not have to sacrifice privacy to exercise *Charter* rights.[25]

This concern is very much substantiated by known police practice. Individuals who do not consent may be the subject of further investigation, including non-voluntary DNA testing.[26] As outlined further below, descriptions of existing OPP DNA databanks suggest that the results of these non-voluntary tests are being retained.[27] The practice of involuntary collection and retention for those who do not consent further undermines the argument that the choice provided to indivdiuals is 'voluntary' in the first place.

In 2011 the CCLA wrote to both the OPP and the Privacy Commissioner regarding our concerns. The OPP Commissioner replied that he did not believe the practice was coercive, and noted that all persons voluntarily supplying a DNA sample will be asked to sign a consent form, which will "ensure that their *Charter* rights are respected". In the CCLA's opinion, the coerciveness of this practice is not mitigated by having affected persons sign a consent form. Under these circumstances it is difficult to view such "consent" as voluntary, as a police request to sign a consent form is no less coercive than a police request to provide DNA.[28]

The Privacy Commission provided a more detailed analysis of required legal safeguards. Ultimately, however, the Commission reasoned that, in light of current jurisprudence, individuals are "presumptively capable of freely choosing whether to cooperate or refrain from cooperating, at least in a context marked by the employment of the necessary safeguards and limitations."[29] CCLA continues to have serious concerns about the general validity of "voluntary" consent during police DNA sweeps, absent appropriate safeguards such as judicial authorization. Even accepting that consent may at times be valid and voluntary, the specific circumstances under which consent is requested must be carefully examined in every case. Such an examination should consider not only the coercion inherent in the police request, but also the presence of additional coercive factors. In light of the above, it would in fact

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[25] *R. v. Chehil*, 2013 SCC 49, [2013] 3 S.C.R. 220 at para 44.

[26] For an example of the police using this tactic see R. v. Nicholas, 2004 CanLII 13008 (ON CA) at para 2-4 ("The Task Force received hundreds of tips. Based on them, the police identified between one and two hundred "persons of interest". At trial, the distinction between a person of interest and a suspect was explained as being that a person of interest has no incriminating evidence linking him or her to the offence, whereas a suspect does. As part of the investigation, persons of interest were asked to provide a buccal swab for a DNA analysis. If they agreed to do so, they were asked to sign a consent form. At the time the consent DNA samples were obtained, the police did not have any suspects.People who refused to consent were placed under surveillance for the purposes of obtaining a discard sample. Two officers testified at trial that out of seven individuals who refused, discard samples were subsequently obtained from four of them. No follow-up was conducted on the other three individuals.").

[27] Centre of Forensic Sciences, "DNA Databank", available at http://www.mcscs.jus.gov.on.ca/stellent/groups/public/@mcscs/@www/@com/documents/webasset/ec082248.pdf.

[28] Correspondence from Nathalie Des Rosiers, CCLA General Counsel, to Commissioner Cavoukian, Ontario Information and Privacy Commission (June 13, 2011).

[29] Correspondence from Brian Beamish, Assistant Commissioner, to Nathalie Des Rosiers, CCLA General Counsel, Re: The police use of the DNA request tactic in Ontario, October 14, 2011.

be more appropriate to deem DNA collection sweeps as presumptively coercive, absent evidence that this was done with the individual's willing and voluntary consent.

***The Problematic Nature of "Consent" in Employment Settings and the Particular Vulnerability of Migrant Workers***

Two elements of the DNA collection that the OPP conducted in Elgin County raise particular concerns about the voluntariness of the consents that were obtained. First, the CCLA asserts that approaching an individual at work in itself is a heightened intrusion on individual privacy, and significantly restricts a person's ability to freely decide whether or not to voluntarily cooperate. Second, migrant workers occupy a uniquely precarious legal and social position, which significantly undermines any notion of voluntariness in the workplace and/or in the presence of the employer.

The possibility of job-related consequences can be sufficient to turn an otherwise voluntary consent into a coercive practice. A police request that may be slightly coercive when made at the doorstep of an individual's private residence takes on an entirely new element when it is made at an individual's workplace. An employee, knowing that their employer is present and aware of the police request, may reasonably fear not only the law enforcement consequences of declining to cooperate, but also the employment consequences as well.

We are not aware of any cases that examined the validity of consent where "voluntary" DNA collection sweeps were carried out at individuals' place of employment. There have, however, been numerous Ontario rulings on the validity of consent in situations where an individual reasonably fears that refusal to consent to a privacy-invasive police record check means that he or she will not obtain employment. In *Ottawa v Ottawa Professional Firefighters Association*, the labour arbitrator noted that, for an employer to rely on an employee's consent to a background check, it "must be a free and informed consent... and not merely one that he or she has been obliged... to provide."[30] The Ontario Information and Privacy Commissioner has found that consent is undermined where an individual reasonably believes that he or she will not obtain employment if consent is not provided.[31]

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[30] *Ottawa (City) v Ottawa Professional Firefighters Association* (2007), 169 LAC (4th) 84.

[31] Ontario Information and Privacy Commissioner, MC13-49, (March 26, 2014) ("...it is important to note that there is an element of coercion that comes to play in the police records check process. Applicants are required to provide their consent in the form chosen by the police. The young person or child, who is now an adult, seeking to participate in employment or an education program has no choice but to sign the form, including the consent, or no reference check will be performed."). Information and Privacy Commissioner of Ontario, Letter to Susan Cardwell, Records Manager Durham Regional Police Service, and Karen Vandervelde, Supervisor, Records Services, Peel Regional Police, Re: Police Records Checks; Legal Requirements and Best Practices in Ontario, December 6, 2010 at p. 10 ("irrespective of how informed any individual may be, participation in police records check programs is generally not voluntary, particularly where there is no indication that meaningful negotiation as to the scope and extent of disclosure is provided for as part of the process. In this regard consider the following. Employers insist on police checks. Police agencies design and determine the operation of police records check programs. Individuals are presented with police "waiver" forms. Police require that these forms be signed, generally without

*Application to the Complaint*

In light of the above, and based on the facts as alleged including individuals' detention in police cars, it appears that numerous coercive factors were present —creating a strong presumption that willing and voluntary consent was not possible under the circumstances. These factors include the particular vulnerability of migrant workers; their precarious position with respect to their employers, their jobs, their housing and their status in Canada; the location of the police investigation and exchange with police at their place of employment; individuals' detention in police vehicles; the likelihood that migrant workers feel particularly vulnerable with respect to law enforcement officials (hence their reluctance to come forward with this complaint); and more generally their vulnerability with respect to asserting their legal rights – including the "right" to refuse the request for a DNA test. These factors are heightened in the context of a DNA collection sweep not based on individualized suspicion or investigation, in which no one person may feel the need to clear their name.

*Additional Required Safeguards on DNA Retention and Use*

In addition to valid consent, an inquiry into whether a search and seizure is reasonable under section 8 will entail an analysis of law enforcement's practices regarding retention and use. Some safeguards are enshrined in statute. For example, section 487.09(3) of the *Criminal Code* requires that:

> 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.[32]

Similarly, the fact that DNA obtained will only be tested using non-coding DNA is a privacy safeguard that has been central to the courts' analysis of the constitutionality of DNA databanks.[33]

The Ontario Privacy Commissioner has concluded that proper governance of DNA request tactics in Ontario requires a number of ancillary safeguards, over and above voluntary consent:

1) DNA request tactics should only be employed in the investigation of serious offences where the police have the DNA of the individual(s) reasonably believed to have committed the offence ( "crime scene DNA");

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modification. Disclosure follows."). The Ontario Court of Appeal in Tadros v. Peel (Police Service), 2009 ONCA 442, at para. 38 similarly has stated that that "the fact that a person effectively must consent to a Vulnerable Persons Search in order to apply for certain types of jobs may be perceived as coercive and, in that way, possibly unfair." In the Court's view, however, this potential unfairness is mitigated by the fact that employers involved with vulnerable persons need access to information about prospective employees' criminal histories and that, "in a case where withdrawn charges which were false are disclosed, the potential employee has the ability to explain the circumstances to the proposed employer."

[32] *Criminal Code*, RSC 1985, c C-46, s 487.09(3).

[33] See, for example, *R .v. S.A.B.*, 2003 SCC 60 at para 48-49.

2) Police should only request DNA materials from individuals likely to share one or more genetic characteristics with that found in the crime scene DNA;
3) Bodily samples must be collected in a manner that respects the privacy, dignity, and physical integrity of the affected individuals;
4) DNA materials may only be collected and used for a clearly articulated and limited purpose –the specified investigation underway. Only non-coding DNA may be used and DNA analysis may only be conducted to compare identifying information to the existing sample(s) associated with the offence under investigation. To the extent that police wish to match DNA samples obtained on consent with those associated with cold cases, they may only do so where that additional specific purpose is expressly agreed to in writing.
5) Per section 437.09(3) of the Criminal Code, bodily substances that are provided voluntarily by a person and the results of forensic DNA analysis must be destroyed or, in the case of results in electronic form, access to those results must be permanently removed, without delay after the results of that analysis establish that the crime scene DNA was not from that person. The same rules should apply to any DNA materials collected by police surreptitiously from innocent individuals who exercise their right to refuse to provide their DNA on consent.
6) Consent forms must be written in plain language and should inform individuals of:
    i. The scope of the consent vis-à-vis all known anticipated uses and the resulting criminal jeopardy;
    ii. The right to refuse consent and vary the terms of use;
    iii. The right to counsel; and
    iv. The police duty to limit their use of DNA materials to those expressly agreed to and to destroy or permanently remove all consent samples and the results of forensic DNA analysis without delay.[34]

The CCLA agrees that all of these safeguards (and, we would argue, several more given concerns about consent) are necessary for the legal operation of "voluntary" DNA collection. We are very concerned, therefore, that Ontario appears to be operating a "Local Discard Index" DNA databank, which is "a "Local DNA Index" of DNA profiles from samples discarded by suspects under surveillance.[35] The existence of this databank suggests that the OPP and other Ontario police services are not complying with the requirement in point 5 above, that the same rules requiring non-match distruction apply to DNA materials "collected by police surreptitiously from innocent individuals who exercise their right to refuse to provide their DNA on consent."[36]

[34] Correspondence from Brian Beamish, Assistant Commissioner, to Nathalie Des Rosiers, CCLA General Counsel, Re: The police use of the DNA request tactic in Ontario (14 October 2011).
[35] Centre of Forensic Sciences, "DNA Databank", available at http://www.mcscs.jus.gov.on.ca/stellent/groups/public/@mcscs/@www/@com/documents/webasset/ec082248.pdf.
[36] Correspondence from Brian Beamish, Assistant Commissioner, to Nathalie Des Rosiers, CCLA General Counsel, Re: The police use of the DNA request tactic in Ontario, October 14, 2011.

The collection, retention and databanking 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.[37] 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*.

### *5. Conclusion*

In summary, it is the CCLA's position that the manner in which the OPP is conducting 'voluntary' DNA sweeps violates ss. 8 and 15 of the *Charter*. The maintenance of a 'Local Discard Index' also violates s. 8 of the *Charter* and provincial privacy law. As concrete measures, we urge that OPP clearly establish the following limits to DNA sweeps:

a. In CCLA's view, DNA sweeps are presumptively coercive and barring exigent circumstances it is best practice to obtain judicial authorization prior to engaging in such activity.

b. At a minimum, police services should ensure there are written guidelines outlining when the tactic of DNA sweeps will be used, the authorization process for approving the technique, and safeguards that must be in place. These guidelines should be posted on the Internet.

c. Policing representatives and individual officers should be prohibited from making statements that suggest individuals are under any moral or legal obligation to comply with voluntary DNA demands.

d. Requests for voluntary DNA should be made in as private a setting as possible. These requests should, to the fullest extent possible, not take place in the presence of the employer, landlord, or in other circumstances that creates or exacerbates vulnerability for the individual.

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[37] For an example of the police using this tactic see *R. v. Nicholas*, 2004 CanLII 13008 (ON CA) at para 2-4 ("The Task Force received hundreds of tips. Based on them, the police identified between one and two hundred "persons of interest". At trial, the distinction between a person of interest and a suspect was explained as being that a person of interest has no incriminating evidence linking him or her to the offence, whereas a suspect does. As part of the investigation, persons of interest were asked to provide a buccal swab for a DNA analysis. If they agreed to do so, they were asked to sign a consent form. At the time the consent DNA samples were obtained, the police did not have any suspects.People who refused to consent were placed under surveillance for the purposes of obtaining a discard sample. Two officers testified at trial that out of seven individuals who refused, discard samples were subsequently obtained from four of them. No follow-up was conducted on the other three individuals.").

e. Given the heightened vulnerability of migrant workers, police should consult with groups that work with and advocate on behalf of migrant workers to discuss best practices for conducting investigations within these communities.

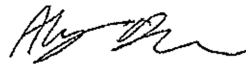
f. When dealing with a particularly vulnerable population, CCLA is of the view that it would be appropriate for police to proactively facilitate access to free and private legal advice to ensure that individuals understand their rights before asking them to provide consent.

g. The "Local Discard Index" should be destroyed; individuals who do not consent to voluntarily provide DNA samples should not receive less privacy protections because they exercised their constitutionally-protected privacy rights.

h. Under no circumstances should DNA sweeps take place in a manner that would constitute illegal and unconstitutional discrimination under the *Charter* and the *Ontario Human Rights Code*.

Thank you very much for giving us the opportunity to provide submissions on this issue. We would be happy to answer any questions you may have or provide further details.

Best regards,



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