



HUMAN RIGHTS TRIBUNAL OF ONTARIO

BETWEEN:

Leon Logan

Applicant

-and-

**Her Majesty the Queen in Right of Ontario as represented
by the Ministry of the Solicitor General (Ontario Provincial Police)**

Respondent

-and-

Ontario Human Rights Commission

Intervenor

DECISION

Adjudicator: Marla Burstyn

Date: August 15, 2022

File Number: 2015-22136-I

Citation: 2022 HRTO 1004

Indexed as: Logan v. Ontario (Solicitor General)

OVERVIEW

[1] This case is about whether a police investigation conducted in the fall of 2013 to investigate a sexual assault was discriminatory because of the applicant's race, colour and/or place of origin, contrary to the *Human Rights Code*, R.S.O. 1990, c. H.19, as amended (the "*Code*"). Specifically, the applicant, Leon Logan, a migrant farmworker, alleges that these *Code* grounds were a factor in the request made by the respondent Ontario Provincial Police ("OPP" or "police") for a voluntary DNA sample from him and other migrant farmworkers in the area as part of its investigation (the "DNA canvass").

[2] The OPP denies discrimination and provides the explanation that the DNA canvass was based on the description of the assailant as a migrant farmworker, the proximity of migrant farmworkers to the scene of the crime, the urgency of the situation, and the voluntariness of the DNA request.

[3] Following a merits hearing of this Application, for the reasons provided below, I find that race, colour and place of origin were factors in the OPP's DNA canvass, and that Mr. Logan has on a balance of probabilities established discrimination contrary to section 1 of the *Code*.

PROCEDURAL BACKGROUND

[4] This Application is the "lead case" in a group of 54 Applications brought by migrant farmworkers with the same allegations of discrimination with respect to the same DNA canvass.

[5] By way of procedural background, in the Interim Decision on delay, *Hosein v. Ontario (Community Safety and Correctional Services)*, 2018 HRTO 298 ("*Hosein*"), following a preliminary hearing the Tribunal decided that Mr. Logan and one other applicant (Lewis LaRosa file 2015-22137-1) established that their delay in filing this Application was incurred in good faith within the meaning of s. 34(2) of the *Code* and the Applications would proceed to a merits hearing. *Hosein* states that whether the remaining 52 applicants can demonstrate good faith delay would be determined at a later date, if

the lead case establishes that the respondent infringed the applicant's rights. Following this, the parties agreed that Mr. Logan's Application would proceed as the lead case to a hearing on the merits.

[6] Prior to the merits hearing, the Tribunal dismissed the respondent's request to defer the Application pending an ongoing certified class action involving a broader group of claimants to determine whether the OPP breached section 8 of the *Charter* or committed the tort of intrusion upon seclusion in relation to this and other DNA canvasses that have been conducted in Ontario. See *Logan v. Ontario (Solicitor General)*, 2021 HRTO 382 ("Interim Decision on Deferral").

[7] The Tribunal made a number of procedural directions based on the consent of the parties in relation to the merits hearing. See Case Assessment Directions November 3, 2021, January 5, 2022, February 9, 2022, and February 18, 2022. In addition, an Order excluding witnesses was made.

[8] The Ontario Human Rights Commission (the "OHRC") intervened as a party under s. 37(2) of the *Code* and exercised full rights to participate in the merits hearing.

[9] The hearing of the evidence proceeded on November 22, 23, 24 and 25, 2021. The parties filed comprehensive and helpful written closing submissions, followed by delivering oral closing submissions on March 1, 2022, all of which have been considered.

[10] For the applicant, I heard testimony from Mr. Logan and expert opinion evidence from Dr. Jenna Hennebry.

[11] For the respondent, I heard testimony from five OPP officers who played the following roles in the investigation:

- Detective Superintendent Gonneau - at all material times held the rank of Detective Sergeant and was the Area Crime Supervisor for Oxford County and Detective Sergeant with West Region, Criminal Operations ("D/S Gonneau")

- Detective Constable Nolan - the Lead Investigator (“D/C Nolan”)
- Detective Staff Sergeant Raffay - the Case Manager (“D/S/S Raffay”)
- Detective Constable Vanbussel - interviewed Mr. Logan for the DNA canvass (“D/C Vanbussel”)
- Identification Services Constable Bates - worked in the investigation as a Forensic Identification Services Officer

[12] This decision addresses why the applicant has established a breach of the *Code* and the appropriate monetary remedy for that violation.

[13] The parties agreed to bifurcate the hearing in relation to the applicant and the OHRC’s request for non-monetary and public interest remedies. Therefore, those additional remedial requests are not addressed in this decision.

BACKGROUND FACTS

[14] The following background facts are based on the witnesses’ testimony and the documentary evidence. I have not set out all of the evidence heard in this case; I have only set out the evidence I consider relevant and necessary to decide the issues. This evidence is uncontradicted and accepted, unless otherwise noted. Where evidence is in dispute and requires an assessment of credibility and/or reliability, I have done so in the Analysis and Findings section below. The main dispute between the parties is what conclusions I should draw from the evidence.

Mr. Leon Logan

[15] Mr. Logan is a Black man from Jamaica. In the fall of 2013, he was in his late 20’s, participating in the Seasonal Agricultural Worker Program (“SAWP”) for his fifth year. He went on to work in the SAWP two more times after 2013. Mr. Logan was employed by a farmer in a small rural predominantly White community in Elgin County in Ontario. He worked on the farm and lived with other migrant farmworkers in one of several

bunkhouses spread out on the farm property. All of the migrant farmworkers were Black or Brown men.

[16] Below I discuss in detail the evidence about the SAWP. For introductory purposes here, I note that under the SAWP, Mr. Logan's employer could end his employment and cause his deportation for any reason. Mr. Logan knew and understood this.

Sexual Assault

[17] In the fall of 2013, a woman was violently sexually assaulted in her home. She lived alone in an isolated area near the farm where Mr. Logan worked. What the OPP knew about the crime is relevant to determining whether it has provided a credible non-discriminatory reason for the investigation it conducted. For that reason, I summarize here some of the details of the sexual assault that took place. Before doing so, I note that the OPP filed a copy of the sentencing transcript (with the victim's name redacted) which notes that the information contained in the transcript cannot be published, broadcast, or transmitted pursuant to ss. 486.4(1) and 517 of the *Criminal Code*. This decision respects that publication ban.

[18] On October 19, 2013 at approximately 9:00 p.m., the victim stepped on to her porch for a cigarette. She had just sat down when suddenly there was a gloved hand around her mouth. The assailant pulled out a knife in front of her face. She started fighting him. He had a hoodie pulled down over his face, but it did not take her long to observe that he was a Black male. She did not know him. She was knocked backwards, and her head hit the brick wall of the house. She kept fighting him. He dragged her into the house. She was standing and facing him, but he kept trying to turn her around. He then had her face down on the floor in her living room and he started to choke her with a piece of cloth. At that point, she stopped resisting. He blindfolded her and he tied up her wrists. He told her that he was sent there to murder her, but he would rape her instead. The assailant then sexually assaulted her. After, he tied up her wrists again and her ankles and put something in her mouth. He wiped her down with a cloth and threatened her with death if she called the police. The assailant was in the victim's home for at least 45 minutes.

The Victim's Description of the Suspect

[19] The evidence about the victim's description of the suspect that she provided to the OPP, which I describe here, is an important aspect of this case.

[20] On October 20, 2013 at 2:27 p.m., the victim placed a call to the OPP to report the sexual assault that occurred the previous night. A transcript of that call was filed as evidence at the hearing. The victim described the suspect as a male "migrant worker" who "had an accent". She said he was wearing a hoodie and gloves. She reported that he had grabbed her off her porch, tied her up, had a knife, and tried to rape her. He told her he was going to murder her.

[21] D/S Gonneau was notified of the call within about a half hour. She assigned D/C Nolan, the Lead Investigator, to attend the victim's residence to conduct a preliminary investigation. D/C Nolan subsequently contacted D/S Gonneau to advise her that the victim had provided information consistent with what she had reported during her initial call to the OPP. D/S Gonneau put a number of investigatory steps in place, such as securing the scene, questioning individuals living in the immediate area, and collecting physical evidence. The police also arranged for interviews with the victim's friend and ex-boyfriend. D/C Nolan testified that on October 21, 2013, after canvassing individuals living in the immediate area, it was apparent that no one had observed anyone or anything around the time of the attack.

[22] On October 20, 2013 the victim was taken to the hospital and attended for a sexual assault treatment kit. Around mid-day on October 21, 2013, the victim was interviewed by police to give her formal Statement, while D/S Gonneau was present. D/S Gonneau testified that the victim was extremely credible and she believed her story. The transcript of the interview, i.e. her formal Statement, was filed as evidence at the hearing.

[23] In her Statement, the victim said that she was certain the assailant was one of the migrant farmworkers. When asked what the light on the porch was like, she said, "...you could see because of the sentinel light but ... 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...".

[24] In her Statement, the victim included the following description of the assailant:

- Black male. When probed further, the victim stated, "I'd say he was fairly dark and not the darkest end of the spectrum".
- Very low and raspy voice with a heavy accent. The victim stated, "I had trouble understanding sometimes what he said ... I'm no expert but it just struck me as a Jamaican accent".
- Wearing a grey hoodie (which he never took off), work pants, and socks.
- Between 5'10" and 6' tall.
- Very muscular with no excess fat on his chest.
- No facial hair.
- Mid to late 20's.
- Full nose, full lips and "I guess his jaw was he looked like a young man to me".

[25] This description and evidence about the limitations on the victim's opportunity to observe the suspect is discussed in the Analysis and Findings section below.

Composite Sketch and Press Release

[26] On October 21, 2013, the police put out a press release to enlist the public's assistance in solving the crime. The press release included the victim's description of the suspect.

[27] D/S Gonneau arranged for a composite sketch artist to work with the victim and the sketch was completed on October 23, 2013. The officers showed the sketch to some farmers in the area as an investigative tool. The composite sketch was not shown to the migrant workers at any time.

Nature of a DNA Canvass as an Investigative Technique

[28] Before setting out the evidence about the DNA canvass conducted in this case, I turn to the evidence about the general nature of a DNA canvass as an investigative technique.

[29] DNA evidence is highly important in police investigations and in the administration of justice. Forensic DNA analysis has high probative value as it is capable of both identifying and eliminating suspects. See *R. v. S.A.B.*, [2003] 2 S.C.R. 678 at para. 61 and *R. v. K.M.*, 2011 ONCA 252 at para. 79.

[30] However, D/S Gonneau and D/S/S Raffay testified that voluntary DNA canvasses are not commonly employed by the police as an investigative technique. It is important to understand that a voluntary request for DNA by police, which is what the OPP set out to do in this case, is distinguishable from when law enforcement is permitted to take a DNA sample from an individual with judicial authorization, based on a DNA search warrant when specific conditions set out in the *Criminal Code* have been met. Although I heard no specific evidence on this, it is understood that the specific preconditions for the issuance of a DNA warrant under the *Criminal Code* for investigative purposes, which include that there are reasonable grounds to believe that the person was a party to an offence, were not met here.

[31] The police officers testified about the purpose of a DNA canvass. D/S/S Raffay testified that a DNA canvass is used by the police on a group of individuals to determine if one individual in the group is the perpetrator of a crime. One purpose of the DNA canvass is to lead the police directly to the assailant by finding a match between a DNA profile voluntarily collected from one of the individuals in the group and the DNA profile collected from the crime scene (“the crime scene DNA profile”). Another purpose of the DNA canvass is to narrow the police investigation by eliminating individuals in the group who provide a DNA profile that does not match the crime scene DNA profile. There is one additional purpose of the DNA canvass acknowledged by D/C Nolan and D/S/S Raffay in their testimony. When a person refuses to provide consent to give their DNA to police,

even though they are legally entitled to refuse, it *may* cause the police to have a heightened suspicion about that individual's involvement in the crime.

[32] The courts have found a DNA canvass to be a permissible investigative technique. See *R. v. Osmond*, 2009 BCSC 550; BCSC 1713; 2012 BCCA 382 at paras. 22-23 ("*Osmond*"). However, there was no OPP policy on voluntary DNA canvasses to guide the officers as to what criteria should be applied when deciding whether to conduct a DNA canvass or as to how it should be conducted. None of the officers involved in this police investigation, all of whom were experienced, had any training or experience in DNA canvasses. D/S Gonneau was only aware of one or two cases where the OPP conducted a DNA canvass and she had been to one lecture about DNA canvasses. None of the officers involved in the case had ever participated in a DNA canvass.

Decision to Conduct a DNA Canvass and Scope of Canvass

[33] D/S Gonneau testified that on the evening of October 20, 2013, she spoke to D/S/S Raffay, who was assigned as the Case Manager, about investigative steps. D/S Gonneau testified that she mentioned to him the "preliminary idea" of conducting a voluntary DNA canvass of migrant farmworkers, which seemed like an appropriate investigative avenue to her based on the preliminary information available to her. D/S Gonneau testified that no decision was made that evening about the DNA Canvass.

[34] D/S Gonneau testified that on October 21, 2013 at 5:34 p.m., after the victim gave her formal Statement, she had a meeting with D/S/S Raffay and the supervising Sergeant. At that meeting, D/S Gonneau presented a voluntary DNA canvass as an investigative technique, and they discussed its merits in the context of the investigative challenges. They all agreed that this was an appropriate investigative tool and the decision was made to interview and seek consent to take DNA samples of all migrant workers in nearby farms. In formulating the approach to the DNA canvass, the police did not exclude any of the workers from the DNA canvass if they did not match the other physical descriptors given by the victim (i.e. age, height, build, facial hair). The police did not request DNA samples from the farmers or the supervisors on these farms who were all White.

[35] D/S Gonneau, D/S/S Raffay and D/C Nolan all testified about why a DNA canvass was an appropriate investigative tool and why the DNA canvass had to be broad to include all migrant farmworkers in the area. Whether the respondent's explanation for the DNA canvass is a credible non-discriminatory explanation is very much in dispute. Their explanation includes that it was the time of year when the migrant workers would be returning to their home countries and may never return. D/S Gonneau testified that she was worried about how they would be able to deal with such a large number of individuals in a short period of time. Also, they testified that based on their years of experience, they knew that identification of the suspect's physical characteristics in a violent assault of this nature could be problematic. A more fulsome description of the evidence relating to the OPP's explanation for the DNA canvass is in the Analysis and Findings section below.

DNA Canvass Process

[36] The OPP organized the DNA canvass of the migrant workers through the farm owners and conducted the DNA canvass on five farm properties in total. D/C Nolan testified that they conducted the DNA canvass so as to not interrupt the workers' work schedule. The officers, who worked in pairs, testified that they first interviewed each migrant worker, then asked for consent to provide a DNA sample, and then another officer took the DNA sample.

[37] The OPP conducted an interview with each migrant worker separately in the back of an unmarked police vehicle with no caging between the front and back seats. The officer used a "Canvass Form" that D/C Nolan and another officer had created, approved by D/S/S Raffay, to interview each migrant worker. The Canvass Form included the following:

- Date of birth, current and home address, home and cell phone number
- Physical description of the migrant worker
- What if anything can you tell the officer about the sexual assault that occurred on October 19 between 8 and 11 pm?

- Where were you on October 19 between 8 and 11 pm and who can confirm this?
- Who is your employer and how long have you worked there?
- Are you a Canadian citizen and if not, what is your home country?
- How long have you been in Canada?
- Have you worked elsewhere in Canada and if so, where and when?
- How many people reside at this location?
- Were any of the occupants NOT in the residence on October 19 between 8 and 11 pm?
- Are you planning on leaving the area in the near future?
- Do you have any information that makes you suspect any person as being involved in this sexual assault?

[38] The officers did not share the victim's suspect description with the migrant workers. A number of the Canvass Forms were filed as evidence at the hearing. The Canvass Forms show that the officer would generally include the migrant worker's height, weight, a description of facial hair, and sometimes other descriptors like their accent or something specific about their teeth (e.g. crooked). The Canvass Forms include examples where the physical description of the migrant worker that the officer wrote on the Canvass Form did not match the most generous interpretation of the description given by the victim. D/C Nolan and D/S Gonneau both acknowledged this in their testimony on cross-examination.

[39] The Canvass Forms show that some of the migrant workers told the officers where they were at the time the assault took place, and provided names or nicknames of one or more individuals who could confirm where they were. The Canvass Forms show that some of the migrant workers told the officers if any (or how many) occupants of their residence (i.e. bunkhouse) were not in at the time the assault took place. Finally, the Canvass Forms show that the migrant workers told the officers when they were planning on leaving the area, some not until December 15, 2013, some on earlier dates, and some were uncertain of the date.

[40] Following the interview, the officers asked the migrant worker for his consent to provide a DNA sample. The officers requested a DNA sample regardless of the answers to the interview questions provided on the Canvass Form. The officers used a Consent to Provide Biological Samples Form (“the Consent Form”), a Ministry form, for this purpose. The officers read out the Consent Form to each migrant worker and took an audio recording of the consent process for each migrant worker. The Consent Form includes that the request for the DNA sample was voluntary to determine their involvement, if any, in the sexual assault and that they had the right to retain counsel. The Consent Form also includes that bodily samples “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 the crime under investigation”. The Consent Form provided three options to the migrant worker:

1. I agree to provide this sample without calling any lawyer or anyone else.
2. 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.
3. I refuse to provide a biological sample.

[41] If the migrant worker signed the Consent Form indicating their agreement to provide the sample, he was then escorted to a police van where an OPP Forensic Identification Officer took a cheek swab.

DNA Canvass of Mr. Logan

[42] The OPP began the DNA canvass on October 22, 2013 at the farm where Mr. Logan worked, which was the closest farm to the victim’s residence. Mr. Logan testified that the farm owner approached him and others while they were working in the field and instructed them to accompany him in his vehicle. The farm owner told them that a woman had been raped and that they needed to take a DNA test to clear their names. He testified that he understood from his employer that he and the other workers were expected to cooperate with the police. The farm owner drove the group to a number of unmarked police vehicles on the property. The officers asked Mr. Logan to enter one of the vehicles

at which time they explained the nature of the investigation to him. Mr. Logan testified that he felt as though he had no choice but to cooperate with the police.

[43] Mr. Logan testified that the officers asked him for his name and date of birth and for his consent to provide a DNA sample to assist the police in identifying the person responsible for the sexual assault. There is a roughly 5-minute audio recording of the conversation between Mr. Logan and D/C Vanbussel reading the Consent Form to Mr. Logan. Mr. Logan signed the Consent Form. He was then taken to another police vehicle for the cheek swab.

[44] Mr. Logan's testified that he did not want to provide a sample of his DNA, but he agreed to do so in an effort to appease the police and his employer. The parties dispute whether Mr. Logan's response to the request for his DNA constituted voluntary and informed consent.

[45] Mr. Logan testified that he was first approached by police officers to collect his DNA, and in the days following the collection of his DNA sample, he was interviewed by the police about what he knew about the sexual assault. This is the reverse order from the officers' testimony about how the DNA canvass was conducted. Nothing turns on the order that took place in Mr. Logan's case, and I make no specific finding of fact on that point.

[46] During the interview, in answer to their questions, Mr. Logan explained where he was and who he was with when the crime occurred. The questioning took about 5 to 10 minutes. The Canvass Form states that Mr. Logan was "home at Pastors" (the name of his bunkhouse), that "Hezekiah Ormsby" can confirm this, and that "approximately four people went to the party". (The evidence is that on the night of the assault, there was a farm party in close proximity to where the victim lived, where migrant workers from various farms came together for a party.) Mr. Logan testified that he continued to feel as though he had no choice but to cooperate with the police. On cross-examination, Mr. Logan stated that he did not have any concern about answering the questions because he did not have anything to hide.

Timeline of the DNA Canvass

[47] The DNA canvass was conducted at the first farm on October 22, 23 and 24, 2013. The evidence suggests that the police conducted a DNA canvass of roughly 80 migrant workers at the first farm over the course of these three days. Two men at the first farm refused to provide a DNA sample. It was later discovered, as will be discussed below, that the police somehow missed the assailant during the DNA canvass on the first farm; the officers did not interview him or request his DNA at this time.

[48] After completing the DNA canvass at the first farm, the officers expanded their DNA canvass to four more farms that were more distant from the victim's home, but still in the area. (While I heard no evidence about the precise distance of these four farms from the victim's home, the evidence is that they were in the area.) The officers spoke with and showed the composite sketch to the White farmers on October 25, 2013 and returned on October 28, 2013 to conduct the DNA canvass of the migrant workers at these four farms. Two men on these farms refused to provide a DNA sample.

[49] In total, the OPP collected approximately 96 consent DNA samples. The police decided to take no further action with respect to any of the four workers who refused to provide a DNA sample.

DNA Analysis and Identification of the Assailant

[50] On October 22, 2013, the OPP submitted a number of items from the crime scene to the Centre for Forensic Analysis (the "CFS") for DNA analysis along with the vaginal swab from the sexual assault kit. It was not known for certain if any of those items would generate a DNA profile until the CFS report was completed. D/C Nolan testified that on October 23, 2013, D/S/S Raffay contacted the CFS to request that the results be expedited. The CFS advised that it would complete its review in approximately two weeks.

[51] On November 5, 2013, the CFS informed the police that a male crime scene DNA profile had been obtained. On November 8, 2013, the CFS reported that none of the DNA samples that the police had collected from the migrant workers matched the crime scene DNA profile.

[52] D/C Nolan testified on cross-examination that on November 13, 2013, he was assigned to compile a list of migrant workers at farms in neighbouring counties. They were looking at expanding their search to a much wider geographical area to eliminate any other possible persons of interest, but never did actually conduct a further DNA canvass in those counties.

[53] D/C Nolan testified that around the same time, on November 15 or 16, 2013, the investigative team cross-referenced the list of migrant workers from the farms where they had conducted the DNA canvass, with a list of migrant workers who had provided DNA to make sure that they spoke to everyone at those farms. They identified two migrant workers from the first farm who had not provided a sample, one of whom was Henry Cooper ("Cooper"). The other worker had returned to his home country. The police learned that Cooper had not been interviewed or provided a DNA sample.

[54] The following day, an officer interviewed Cooper with D/C Nolan present. The story Cooper told the officers led them to believe that he was a suspect. D/C Nolan testified that when the interview was conducted, he believed that Cooper generally matched the suspect description that the victim provided (apart from that about four weeks had passed since the assault and he had grown a beard). Cooper was scheduled to leave the country on December 11, 2013. The OPP obtained authorization for a surveillance team to surreptitiously pick up items discarded by Cooper (a pop can, pizza slice tray and napkin) without his consent. The items were sent to CFS for analysis.

[55] On November 28, 2013, CFS confirmed that Cooper's DNA matched the DNA found at the crime scene. He was arrested on November 30, 2013. On June 9, 2014, Cooper pled guilty to Sexual Assault with a Weapon and related charges. He was sentenced to seven years of incarceration.

The Farm Owner

[56] In addition to the farm owners assisting the police in organizing the DNA canvass, D/C Nolan testified that while waiting for the CFS results to determine whether Cooper's DNA was a match, the farm owner called D/C Nolan to let him know that he told Cooper on November 22, 2013 that he would not be bringing Cooper back on the program if he refused to provide a DNA sample. D/C Nolan testified that he asked the farm owner to write him a letter confirming the conversation with Cooper. The letter begins:

When I was informed that three of our off-shore 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), 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 for by the Investigation Police Force. ...

The letter includes that the farm owner told Cooper that it was his intent to invite him back for 2014, but he had decided that any of the workers who refused to take the test would not be invited back next year. He told Cooper that refusing to take the test raised questions about his involvement in the matter. He made Cooper an offer, that if he took the test before he left Canada, and the test showed that he was not involved, the farm owner would give him the opportunity to return next year as one of his long-term workers. As stated previously, Cooper did not consent to provide a DNA sample. There is no evidence about who informed the farm owner that three of their workers had refused to take a DNA test.

Retention of Information

[57] The physical DNA samples provided by the migrant workers were destroyed. The evidence regarding whether the electronic data related to those samples (i.e. the DNA profile) was destroyed was somewhat unclear and I expect to hear more evidence on this in relation to the additional remedies request. The evidence is that the biographical information provided by the migrant workers was not removed from the police case management system, PowerCase.

SOCIAL CONTEXT OF MIGRANT WORKERS

Expert Opinion Evidence

[58] The Tribunal qualified Dr. Hennebry, an Associate Professor/Associate Dean at Wilfrid Laurier University's School of International Policy and Governance, as an expert witness to give opinion evidence about "the characteristics of the SAWP and the systemic vulnerabilities of racialized migrant workers". The respondent did not dispute that Dr. Hennebry was a qualified expert in this area and did not oppose her giving expert opinion evidence within the scope of that defined area.

[59] The Supreme Court of Canada in *R. v. Mohan* 1994 CanLII 80 (S.C.C.), [1994] 2 S.C.R. 9 ("*Mohan*"), and as reframed in *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23, identified the following four criteria for determining admissibility of expert evidence:

- the evidence must be relevant;
- the evidence must be necessary to assist the trier of fact;
- there must be no exclusionary rule otherwise prohibiting the receipt of the evidence; and
- the evidence must be given by a properly qualified expert.

[60] I admitted Dr. Hennebry's expert evidence on the basis that it satisfies the criteria set out in *Mohan*. Dr. Hennebry's extensive *curriculum vitae* shows that she has 15 years of experience in academic research, has published academic journal articles and texts, has taught university courses, and has given expert testimony on migrant workers and the SAWP in Canada. I found Dr. Hennebry's evidence to be necessary to help the Tribunal understand the social context within which Mr. Logan and the other migrant workers were working and living in Ontario under the SAWP. This context is relevant to the discrimination analysis and the grounds of discrimination identified in the Application. Dr. Hennebry acknowledged her obligation to give fair, objective and non-partisan opinion evidence and I find that she executed that duty when giving her testimony.

[61] I include here an overview of Dr. Hennebry's evidence. The application of this evidence to the issues is found in the Analysis and Findings section below.

[62] The SAWP is jointly operated by the Canadian government and the governments of 11 Caribbean nations and Mexico. It was created by the Canadian government as a response to decades of recurrent labour shortages in Canada's agricultural sector. It is not an immigration program. Dr. Hennebry testified that the SAWP was designed to ensure that workers would return home and not stay in Canada based on racist concerns and fears of large numbers of Black immigrants in rural Ontario. She testified that research has shown that employer discourses often express a crude racism that cast these men as hypersexualized Black subjects who are a danger to Canadian women.

[63] Workers under the SAWP have precarious immigration status which puts them in a vulnerable position. Dr. Hennebry testified that they travel to Canada each year on temporary contracts to work for up to eight months before returning home. SAWP workers engage in this annual cycle of "circular migration" for 10 years, on average. The SAWP creates a vulnerable and temporary workforce with little or no access to permanent status and significant barriers in accessing services and in ensuring the protection of their rights. Dr. Hennebry calls the SAWP a "textbook definition of structural racism" in that it is embedded in colonial histories, and relies on cheap racialized labour with workers who are deemed needed for the economy but unworthy of settlement. As such, the SAWP reinforces "anti-migrant rhetoric" and the exclusion of migrant workers from the social fabric by preventing their integration and inclusion into communities, by design.

[64] Workers under the SAWP also have precarious employment status which puts them in a vulnerable position. They are contractually tied to a specific employer for the season through work permits. The employer is empowered to fire and deport them without cause or explanation. This embeds a power imbalance between employers and workers, with the employer holding most, if not all of the power. Research shows that being tied to a single employer makes it almost impossible for SAWP workers to find better workplaces and represents a significant barrier to accessing rights. This imbalance can foster exploitation and discrimination of workers.

[65] Workers under the SAWP are typically required to live in employer-provided housing often with inadequate living conditions. Their lives are closely regulated by the employers. Employers and community members come to think of workers as “belonging” to employers where workers are seen as delinquent or problematic for being off the farm in public spaces.

[66] Most workers under the SAWP are men from poor households who often have low levels of education and are responsible for supporting large families. The lack of decent employment in their countries of origin is the main reason for participating in the SAWP. This also puts them in a vulnerable position because they are dependent on the program which increases employer control. They fear that expressing a desire to better their employment conditions would lead to them being taken off the program.

[67] Fear of loss of current and future employment, their precarious status in Canada, and the lack of protections for workers combine to heighten barriers to accessing justice and labour and human rights protections. Accessing legal protection, legal support and representation when dealing with legal issues, labour complaints, law enforcement, etc. are all particularly challenging for workers who effectively have to lose their employment and their housing, and eventually their status in Canada if they were to report abuse or file a complaint.

Legal Jurisprudence regarding Migrant Workers Vulnerabilities

[68] Several judicial decisions have recognized the systemic vulnerabilities and disadvantages experienced by migrant workers in Canada. See *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94 at para. 41, *De Jesus v. Canada (Attorney General)*, 2013 FCA 264 at para. 13, and *Schuyler Farms Limited v. Dr. Nesathurai*, 2020 ONSC 4711 at para. 86.

[69] Several Tribunal decisions have also recognized that migrant workers are a uniquely vulnerable group who have difficulty vindicating their rights. See *Monrose v. Double Diamond Acres Limited*, 2013 HRTO 1273 and *Peart v. Ontario (Community*

Safety and Correctional Services), 2014 HRTO 611. Notably, in the Interim Decision on delay, *Hosein* at para. 25, the Tribunal stated that the applicants as migrant workers (one of whom was Mr. Logan) live in a climate of fear of losing their livelihood, including immediate repatriation without any appeal process if they are deemed to be too assertive by their employer.

Disproportionate Policing of Racialized Communities

[70] Judicial notice can be taken of the history of discrimination faced by Black communities in Canadian society, including the significant impact of racial discrimination by the police. There are numerous legal decisions that establish this social context that the Tribunal must bring to bear in this Application. Recently, the Court of Appeal for Ontario wrote in *R. v. Morris*, 2021 ONCA 680 at para. 1:

It is beyond doubt that anti-Black racism, including both overt and systemic anti-Black racism, has been, and continues to be, a reality in Canadian society, and in particular in the Greater Toronto Area. That reality is reflected in many social institutions, most notably the criminal justice system. It is equally clear that anti-black racism can have a profound and insidious impact on those who must endure it on a daily basis. ... Anti-black racism must be acknowledged, confronted, mitigated and, ultimately, erased...

[71] The Supreme Court of Canada wrote in *R. v. Le*, 2019 SCC 34 at para. 97 (“*R. v. Le*”), that “we do not hesitate to find that ... we have arrived at a place where the research now shows disproportionate policing of racialized and low-income communities...” The Tribunal must be attentive to this.

OHRC Policy on Eliminating Racial Profiling

[72] The OHRC refers to the following definition of racial profiling set out by the Supreme Court of Canada in *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39, (“*Bombardier*”):

any action taken by one or more people in authority with respect to a person or group of persons, for reasons of safety, security or public order, that is based on actual or presumed membership in a group defined by race, colour, ethnic or national origin or religion, without factual grounds or reasonable suspicion, that results in the person or group being exposed to differential treatment or scrutiny.

Racial profiling includes any action by a person in a situation of authority who applies a measure in a disproportionate way to certain segments of the population on the basis, in particular, of their racial, ethnic, national or religious background, whether actual or presumed

[73] The OHRC also refers to its Policy *Eliminating Racial Profiling in Law Enforcement*, 2019 which the Tribunal is not bound by, but is required to consider based on section 45.5 of the *Code*. The following excerpts from the OHRC Policy are particularly applicable:

2.4. Criminal profiling and suspect descriptions

Law enforcement organizations may rely on criminal profiling as a method for identifying suspects. They also often respond to descriptions of suspects to select people for investigation. Both situations can give rise to racial profiling depending on how race is relied on.

...

2.4.2 Suspect descriptions

Law enforcement authorities may also act based on information about illegal activity received from victims, surveillance, witnesses or crime reports.

However, law enforcement cannot cast their investigative net widely on Indigenous and racialized individuals when dealing with a vague suspect description involving race. A vague or unreliable description (for example, based merely on sex, skin colour and age range) may give rise to racial profiling concerns.

...

It is **not** racial profiling to act on a reliable physical description of a particular suspect linked to a specific illegal incident where race or related grounds are descriptors alongside other personal characteristics and information, and the person is investigated because they reasonably match that description.

...

3.2.3 Failing to assess the totality of circumstances

...

Racial profiling can also happen when police or law enforcement disregard a specific suspect description in favour of investigating someone whose only matching characteristic is their race, skin colour or ancestry. Care should be taken when law enforcement officers use “sweeps” to scrutinize groups of racialized individuals when a more precise approach could be used, based on the information available.

Example: A woman was sexually assaulted on a university campus. She reported the assault to campus police, who then forwarded the report to local police. The victim described the suspect as a Black male, mid to late 20s, 6’1” to 6’3” with light skin, a thin build and no facial hair. Disregarding this specificity, the police stopped, questioned and in some instances recorded the personal information of several Black males on or around the campus, many of whom did not come close to matching the description. Individuals who were short, muscular, bearded, etc. were caught in the investigative dragnet. These actions raise concerns about racial profiling. [footnotes omitted]

LEGAL FRAMEWORK

Code Provisions that Apply to this Application

[74] Section 1 of the *Code* states that every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status or disability.

[75] There is no dispute that the OPP’s investigation is a “service” within the meaning of the *Code*. Section 1 of *Police Services Act*, R.S.O. 1990, c.P.15, as amended, states that police services provided throughout Ontario shall be provided in accordance with six principles, one of which is “the importance of safeguarding the fundamental rights guaranteed by the *Canadian Charter of Rights and Freedoms* and the *Human Rights Code*.”

Legal Test of Discrimination

[76] The test to decide whether there has been a *prima facie* case of discrimination under the *Code* is articulated in *Moore v. British Columbia (Education)*, 2012 SCC 61 at para. 33 (“*Moore*”), and requires the applicant to show that:

1. The applicant has a characteristic protected from discrimination under the *Code*;
2. The applicant experienced an adverse impact with respect to a social area covered by the *Code*; and
3. The protected characteristic was a factor in the adverse impact.

[77] It is well-established that the protected characteristic does not need to be the only or the major factor in the adverse impact. It is sufficient that the protected characteristic is “a factor” in the adverse impact. All that is required is that there is a “connection” between the adverse treatment and the ground of discrimination. See *Peel Law Association v. Pieters*, 2013 ONCA 396 at para. 59 (“*Pieters*”).

[78] It is also well-established in the jurisprudence that there is no need for the applicant to prove that the OPP or any of the officers involved in the investigation had an intention to discriminate against him. In *Bombardier* at paras. 41 and 49, the Supreme Court of Canada stated that “not requiring proof of intention applies logically to the recognition of various forms of discrimination, since some discriminatory conduct involves multiple factors or is unconscious... Human rights jurisprudence focuses on the discriminatory effects of conduct rather than on the existence of an intention to discriminate or of direct causes.”

[79] If the applicant demonstrates a *prima facie* case of discrimination, then the evidentiary burden is on the respondent to demonstrate a credible, non-discriminatory explanation for the treatment (or the application of a statutory exemption which is not relevant here). If there is no credible non-discriminatory explanation, then discrimination will be found to have occurred. See *Moore*, at para. 33.

[80] If the respondent is able to rebut the *prima facie* case, the burden returns to the applicant to establish on a balance of probabilities that the respondent's explanation is erroneous or a pretext masking the discriminatory ground. The ultimate question is whether an inference of discrimination is more probable from the evidence than the explanation offered by the respondent. The Tribunal must consider all the evidence that both supports and undermines the application in determining whether discrimination has occurred. See *Pieters* at para. 87 and 89, and *McKay v. Toronto Police Services Board*, 2011 HRTO 499 at para. 117 ("*McKay*").

[81] As noted in *Pieters*, at paras. 82-84, in a case where there has been a full hearing on the merits, the *prima facie* analysis may be useful as an analytical tool to consider whether the applicant has been able to establish discrimination, but is not necessarily required. The Court stated at para. 83:

. . . After a fully contested case, the task of the tribunal is to decide the ultimate issue whether the respondent discriminated against the applicant. After the case is over, whether the applicant has established a *prima facie* case, an interim question, no longer matters. The question to be decided is whether the applicant has satisfied the legal burden of proof of establishing on a balance of probabilities that the discrimination has occurred.

[82] Due to the subtle and subconscious undercurrents of racial bias, racial discrimination will seldom be proven by direct evidence and often must be established by inference drawn from circumstantial evidence. Direct evidence is evidence that may on its own support the conclusion of a particular fact. Circumstantial evidence is evidence that may support the conclusion of a particular fact, only because it supports the inference that the event occurred. Inferences must be reasonable, and they must be based on proven facts. In considering whether to draw the inference, the trier of fact must also consider other reasonable or plausible theories "based on logic and experience". The trier of fact must not use speculation to support or reject the suggested inference. See *R. v Villaroman*, 2016 SCC 33 at paras. 23, 32-37.

Onus

[83] The applicant bears the onus of establishing a *prima facie* case of discrimination. Although an evidentiary burden to rebut discrimination may shift to the respondent, the onus of proving discrimination remains on the applicant throughout. See *Ontario (Disability Support Program) v. Tranchemontagne*, 2010 ONCA 593 at paras. 112 and 119 and *Pieters* at para. 68.

[84] The applicant has the onus of proving that the respondent violated his *Code* rights on a balance of probabilities. A balance of probabilities means that it is more likely than not a violation has occurred. Sufficiently clear, convincing and cogent evidence is required in order to satisfy the balance of probabilities test. See *F.H. v. McDougall*, 2008 SCC 53 at para. 46.

Credibility and Reliability of Evidence

[85] In assessing credibility and reliability of the evidence before me, I have applied the traditional test set out by the British Columbia Court of Appeal in *Faryna v. Chorny*, 1951 CanLII 252 (BCCA):

(...) Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors, combine to produce what is called credibility....

The credibility of interested witnesses, particularly in cases of conflict of evidence cannot be gauged solely by the test of whether the personal demeanor of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of the witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.... Again, a witness may testify to what he sincerely believes to be true, but he may be quite honestly mistaken.

[86] I am also mindful of the Ontario Court of Appeal's comments on credibility and reliability in *R. v. Morrissey* (1995), 1995 CanLII 3498 (ON CA), 97 C.C.C. (3d) 193 (C.A.) at p. 205:

Testimonial evidence can raise veracity and accuracy concerns. The former relate to the witness's sincerity, that is his or her willingness to speak the truth as the witness believes it to be. The latter concerns relate to the actual accuracy of the witness's testimony. The accuracy of a witness's testimony involves considerations of the witness's ability to accurately observe, recall and recount the events in issue. When one is concerned with a witness's veracity, one speaks of the witness's credibility. When one is concerned with the accuracy of a witness's testimony, one speaks of the reliability of that testimony. Obviously a witness whose evidence on a point is not credible cannot give reliable evidence on that point. The evidence of a credible, that is honest witness, may, however, still be unreliable.

ISSUES

[87] The issue to be decided is whether the applicant has established, on a balance of probabilities, that the respondent discriminated against him when conducting its investigation of the sexual assault that took place in the fall of 2013. The issue can be broken down as follows:

- a. Has the applicant established a *prima facie* case of discrimination?
 - o Does the applicant have a characteristic protected from discrimination under the *Code*?
 - o Did the applicant experience an adverse impact with respect to a social area covered by the *Code*?
 - o Was the protected characteristic a factor in the adverse impact?
- b. Has the respondent demonstrated a credible, non-discriminatory explanation for the conduct?
- c. Is an inference of discrimination more probable from the evidence than the explanation offered by the respondent?

ANALYSIS AND FINDINGS

A. Has the applicant established a *prima facie* case of discrimination?

[88] The Supreme Court of Canada has stated that a *prima facie* case of discrimination “is one which covers the allegations made and which, if believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent...”. See *Ontario (Human Rights Commission) v. Simpsons Sears Ltd.*, 1985 CanLII 18 (SCC), [1985] 2 S.C.R. 536 at para. 28.

[89] I have conducted a *prima facie* analysis below as an analytical tool, but ultimately I have considered all the evidence that both supports and undermines the Application in determining whether discrimination has occurred.

[90] For the reasons set out below, I find that the applicant has established a *prima facie* case of discrimination, i.e. that race, colour and place of origin were factors in the DNA canvass. The first two parts of the *prima facie* case analysis are not in dispute. The contested issue, and the primary focus of the analysis in this case, is whether Mr. Logan's race, colour and/or place of origin were factors in the police investigation.

The applicant has a characteristic protected from discrimination under the Code

[91] It is not in dispute that Mr. Logan has characteristics protected from discrimination by the *Code*. Mr. Logan is a Black man from Jamaica and was in Canada on a work visa, participating in the SAWP. On this basis, he is protected from discrimination by the *Code* grounds of race, colour and place of origin. In the Application, the applicant also raised citizenship as a *Code* ground, but advised in closing submissions that he had decided to abandon the ground of citizenship since it is subsumed by the ground of place of origin.

[92] The applicant submits that the Tribunal should apply an intersectionality framework in its analysis of this case “to help shed light on the multiple intersecting protected identities of an individual and on the systemic barriers that may flow as a result of those identities”. I agree. An intersectionality framework informs the complex and cumulative

way in which more than one ground of discrimination impacts individuals. The intersection of Mr. Logan's *Code*-protected characteristics of race, colour, and place of origin, shape the social context evidence of migrant workers participating in the SAWP heard in this case. The social context, on its own, is not enough to prove that Mr. Logan was discriminated against. However, it is important because a proper understanding of the social context brings a broader understanding to Mr. Logan's experience. See *R. v. Spence*, 2005 SCC 71 at paras. 56-58, and *Peart v. Peel Regional Police Services*, 2006 CanLII 37566 (ONCA) at para 95-96.

[93] Mr. Logan, as a Black man working in the SAWP, is part of an easily identifiable group within the predominantly White small rural community where he lived and worked, because of his race, colour and place of origin. This case must be considered in the larger context of anti-Black racism and systemic discrimination in policing. See *R. v. Le*, at paras. 95-97. Layered onto this context of anti-Black racism is the expert opinion evidence provided by Dr. Hennebry and the social context of migrant workers participating in the SAWP. Dr. Hennebry's testimony, which I accept, is that the SAWP is rooted in structural racism both historically and in the present day, and creates vulnerabilities that impact migrant workers' ability to assert their rights. Mr. Logan and the migrant workers have precarious employment and immigration status and are socially excluded from their community. The vulnerabilities of the migrant workers are linked to their race, colour and place of origin and put them at risk of discrimination in the context of the OPP's DNA canvass.

The applicant experienced an adverse impact with respect to a social area covered by the *Code*

[94] It is not in dispute that Mr. Logan experienced an adverse impact by the police investigation. A police request for DNA from a person for forensic analysis as a method to investigate a crime, even when the request is voluntary, is a significant intrusion on one's personal privacy and places a high degree of scrutiny on a person. Mr. Logan's

evidence is that the experience had a negative impact on him on a personal level. I find that this amounts to adverse treatment.

The protected characteristic was a factor in the adverse impact

[95] The contested issue, and the primary focus of the analysis in this case, is whether Mr. Logan's race, colour and/or place of origin were factors in the adverse treatment he experienced through the police investigation.

[96] To be clear, at this stage as I assess whether the applicant has established a *prima facie* case of discrimination because of race, colour and/or place of origin, I am not considering whether the respondent has provided a credible non-discriminatory explanation for the DNA canvass. The evidence related to the respondent's explanation overlaps with the evidence discussed here, but is analyzed further under the Respondent's Explanation section below.

[97] Also to be clear, as I assess whether the applicant has established a *prima facie* case of discrimination, I note that the applicant and the OHRC are not claiming that the police may never use a DNA canvass to investigate a crime or that an individual's race cannot form part of a criminal profile or description.

[98] I find that the following evidence establishes that Mr. Logan's race, colour and place of origin were factors in the DNA canvass.

DNA Canvass of all Migrant Workers in the Area

[99] There is direct evidence from the police officers that the OPP conducted the DNA canvass on Mr. Logan and other migrant workers in the area based on their race, colour and place of origin, i.e. their migrant worker status. D/S/S Raffay testified that one of the factors in the decision to ask migrant farmworkers for their DNA sample was the colour of their skin. The police did not conduct the DNA canvass on the White farm owners or any other males in the community.

[100] The evidence is that the victim of the sexual assault had described the assailant as a Black male with a heavy accent which she thought was Jamaican, and she believed he was a migrant worker. This description of the suspect is based on these *Code* grounds: race, colour, and place of origin (based on the described accent and migrant worker status). The police relied on this information as the basis for the DNA canvass.

[101] The evidence is that the victim's description included the suspect's height range, age range, build, and lack of facial hair. However, despite these additional physical descriptors, the police conducted a DNA canvass of all migrant workers in the area, regardless of whether they matched these additional physical descriptions of the suspect.

[102] The following uncontradicted evidence which I accept is that some of the migrant workers did not match even a generous interpretation of these physical descriptions:

- Height: The victim described the assailant's height range as between 5'10" and 6' tall. Yet, the OPP requested a DNA sample from migrant workers who ranged in height from 5'2" to 6'6".
- Build: The victim described the assailant as very muscular with no excess fat on this chest. Yet, the OPP requested a DNA sample from migrant workers who ranged in weight from 110 lbs. to 328 lbs.
- Age: The victim described the assailant as being in his mid to late 20's. Yet, the OPP requested a DNA sample from migrant workers who were much older, including some in their 50's and 60's.
- Facial Hair: The victim described the assailant as having no facial hair. The OPP started the DNA canvass two days after the assault. They completed the DNA canvass of roughly 80 workers at the first farm in three days. A migrant worker without facial hair would not have grown a full beard or full mustache within that time frame. Yet, the OPP requested a DNA sample from some migrant workers who had a mustache, full beard, or goatee.
- Disregard of more than one physical description: The OPP requested a DNA sample from some migrant workers who did not match even a generous description of more than one of the physical descriptors provided by the victim. One example is Mr. Martin Beatrice who was 5'5", 125 lbs, 45 years old, and had a moustache.

- The most extreme example of a migrant worker who did not match the suspect description appears to be Mr. Pooran Persad who was 5'2", 100lbs, 40 years old, had long black hair and a goatee, and was described as East Indian. At least two other migrant workers described as East Indian were also asked for a DNA sample.

Disregard of Information to the Contrary, Failure to Reassess, Heightened Investigation

[103] The migrant farmworkers were a vulnerable, easily identifiable group that was clearly differentiated from the predominantly White community. The evidence is that even once the police officers interviewed the migrant farmworkers and it became obvious when meeting them that some of them did not reasonably match the description provided by the victim, they still asked for a DNA sample. Further, the evidence is that the OPP requested a DNA sample even if the worker provided the police with an alibi. Mr. Logan is an example of a migrant worker who provided an alibi.

[104] This evidence shows that the police officers failed to reassess the scope of the DNA canvass based on new information obtained during the interviews they conducted with migrant workers. Past Tribunal decisions have found that disregard of information to the contrary and failure to reassess policing steps is an indication of discriminatory conduct. See *Maynard v. Toronto Police Services Board*, 2012 HRT0 1220 ("*Maynard*") at para. 173, and *McKay* at paras. 138-141.

[105] Through the DNA canvass, the migrant farmworkers were subject to a heightened police investigation that included asking each worker for a DNA sample which hinged on voluntary and informed consent. DNA canvasses are uncommon and none of the officers involved had ever used this investigative technique. The police officers had no formal training or experience with DNA canvasses and there was no policy to guide them. Past Tribunal decisions have found that heightened suspicion and scrutiny is an indication of discriminatory conduct. *McKay* at para. 149 and *Nassiah v. Peel (Regional Municipality) Services Board*, 2007 HRT0 14 ("*Nassiah*") at paras. 171-172.

[106] This evidence taken together is an indication of discriminatory conduct that further supports a finding of a *prima facie* case of discrimination.

Racial Profiling

[107] The OHRC submits that by singling out Mr. Logan on the basis of his race (among other *Code* grounds), this case could *also* be seen as one of racial profiling. However, as the OHRC notes, the discrimination analysis under the *Code* does not change in a case of racial profiling. In other words, to find discrimination in this case, it is not necessary to make a specific finding that racial profiling occurred.

[108] The respondent's position is that the courts' comments on racial profiling in the criminal law context of a *Charter* challenge to exclude evidence are instructive in considering whether racial profiling as a form of racial discrimination contrary to the *Code* has occurred in this case and the respondent refers to several such court decisions. However, as acknowledged by the respondent, the Ontario Divisional Court in *Shaw v. Phipps*, 2010 ONSC 3884 at para. 60 (upheld on other grounds 2012 ONCA 155) ("*Phipps*") held that the criminal law test for racial profiling should not be adopted to consider whether there has been a *Code* violation.

[109] I have considered the OHRC Policy on *Eliminating Racial Profiling in Law Enforcement*. I find it to be a helpful consideration in the analysis of whether the applicant has established a *prima facie* case of discrimination, as this case includes a nuanced consideration of how a suspect description that includes race (among other *Code* grounds) was used to select people for investigation.

[110] The OHRC Policy indicates that an individual's race can form part of a criminal profile to hone-in on possible suspects, depending on how race is relied on. The Policy states that it is not racial profiling to act on a reliable physical description of a particular suspect linked to a specific illegal incident where race or related grounds are descriptors "alongside other personal characteristics and information", and the person is investigated because they reasonably match that description.

[111] Notably, the Policy indicates that racial profiling can also happen when police or law enforcement disregard a specific suspect description in favour of investigating

someone whose only matching characteristic is their race, skin colour or ancestry. The Policy states that “care should be taken when law enforcement officers use “sweeps” to scrutinize groups of racialized individuals when a more precise approach could be used, based on the information available.”

[112] In this case, the OPP selected the migrant workers for investigation by relying on race and related *Code* grounds because of the victim’s description that the suspect was a migrant worker in the area. The OPP disregarded additional physical descriptions provided by the victim. The OPP cast a wide net by conducting a DNA canvass on all migrant workers in the area based on their race, colour and place of origin, even if they did not reasonably match the height range, age range, build, and lack of facial hair described by the victim. Without making a specific finding, I note for the purposes of this *prima facie* case analysis, that the failure to act on the other physical descriptors of the suspect, in favour of race and related *Code* grounds, raises concerns of racial profiling under the OHRC Policy.

Conclusion on *Prima Facie* Case of Discrimination

[113] In conclusion, I find that this evidence establishes a *prima facie* case of discrimination on the basis of race, colour and place or origin. A *prima facie* case, by definition, is capable of being answered. Consistent with this finding, the evidentiary burden shifts to the OPP to provide a credible non-discriminatory explanation for the treatment.

B. Has the Respondent Provided a Credible Non-Discriminatory Explanation for the Conduct?

[114] When assessing the OPP’s explanation for the DNA canvass, I note that police officers must exercise their discretion to determine reasonable investigative steps to take in a particular case, based on the circumstances of the case before them. The Tribunal has made clear in cases involving allegations of racial discrimination in policing, that it is not the Tribunal’s role to decide or comment on the appropriateness of policing

techniques or the correctness of the exercise of police discretion except to the extent that the use of those techniques or the exercise of that discretion violates the *Code*. See *JKB v. Peel (Police Services Board)*, 2020 HRTO 172 at para. 140 (“*JKB*”). The issue before me is not the quality of the OPP’s investigation. The Tribunal has made it clear that police officers are not held to a standard of perfection during an investigation. Officers who engage in an imperfect, incompetent or even negligent investigation are not necessarily engaging in a discriminatory investigation. See *McKay* at para. 167.

[115] The respondent relies on a number of factors together to explain the DNA canvass. In closing submissions, the respondent explains the DNA canvass based on two primary factors: proximity to the victim’s residence and urgency because the harvest season was soon ending and the migrant farmworkers would soon be returning home.

[116] The respondent further explains that the DNA canvass was necessarily broad because they needed to account for the “real possibility” that the suspect’s physical description provided by the victim may not be accurate. The respondent also explains that the investigative team was careful to ensure that it received consent from each migrant worker before taking a DNA sample.

[117] These and other nuances to the explanation, and the submissions of the parties, are discussed in the analysis below. In my consideration of the respondent’s explanation, I address the applicant’s submissions relating to why the respondent’s explanations may be erroneous or pretextual. Ultimately, the issue is whether the applicant has satisfied the legal burden of proof of establishing on a balance of probabilities that the discrimination has occurred.

[118] Based on the following analysis of the evidence, I find part of the respondent’s explanation for the DNA canvass to be credible on some of the evidence. However, based on the evidence as a whole, I do not find the respondent’s explanation for the DNA canvass to be a credible non-discriminatory explanation for all of its conduct. I consider the evidence related to each aspect of the explanation, but I draw my conclusion based on the totality and cumulative analysis of all of the evidence.

Proximity

[119] The OPP's explanation includes that the DNA canvass of all the migrant farmworkers in the area was based on the proximity to the victim's residence.

[120] In focusing their investigation on migrant workers in the area, the OPP relied on the information from the victim that the suspect was a migrant worker, and that there were migrant workers who worked in close proximity to the victim's home. This is clearly supported by the evidence. The evidence is that the victim identified the suspect as a migrant worker during her initial call to police and in her formal Statement.

[121] Specifically, the evidence is that the victim stated that during the assault she saw that the assailant was a Black male and heard him speak to her with a heavy accent that she believed was a Jamaican accent. She also stated that every day she would see migrant workers go up and down the road in front of her home. Someone familiar with her residence would have known that her regular routine included sitting on her porch in the evening. She even confronted the assailant directly during the assault by telling him that he was one of the workers who would pass by her home. She said in her formal Statement, "I kept saying who are you, who are you, what're you doing and 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." The OPP knew that migrant workers lived in nearby farms and there was no evidence of a vehicle, meaning the assailant likely arrived on foot. The evidence is that the DNA canvass was initially conducted on the closest farm in proximity to the victim's residence. It was then expanded to four more farms in the area. Although I have no evidence of their exact proximity, the evidence is that they were nearby. All of this evidence supports this aspect of the OPP's explanation that they focused the DNA canvass on migrant workers in the area based on proximity to the victim's residence.

[122] However, after the DNA results were obtained on November 8, 2013 and the DNA of the migrant workers in the area were not a match, the evidence of D/C Nolan is that the OPP sought out a list of farms in order to conduct a DNA canvass of migrant farmworkers in three neighbouring counties a much greater distance away from the

victim's residence. The applicant relies on this evidence to undermine the OPP's explanation that the DNA canvass was limited by proximity to the victim's residence. D/C Nolan explained in re-examination, that they did not know if it was a migrant worker visiting from other farms because there were parties and information that people "transferred in and out".

[123] I find based on the evidence that the DNA canvass was limited by proximity, initially at the very least. The OPP could have at the outset sought a list of farms in neighbouring counties further away to conduct a DNA canvass of less proximate migrant workers right away, but did not. Later, once DNA results excluded those migrant workers from the farms nearby, and the investigation was not much further ahead, the OPP was apparently willing to cast their net wider to farms further away. In essence, the OPP was later willing to disregard part of the information that it had believed to be reliable - that the suspect was a migrant worker who worked in close proximity to the victim's home – in favour of conducting a DNA canvass of more migrant workers.

[124] The evidence is that the DNA canvass of farms further away was never conducted because around the same time the OPP honed-in on Cooper (once they better organized their lists and data from the DNA canvass done of the farms in the area). Nevertheless, the OPP's apparent willingness to conduct a DNA canvass of migrant workers in neighbouring counties quite a distance away undermines, to some limited degree, the OPP's explanation of proximity.

[125] However, what I find to be more important here is that the respondent's explanation of proximity does not explain why the OPP ignored the other physical descriptions of the suspect provided by the victim when conducting the DNA canvass. This is discussed next.

Frailties of Identification Evidence

[126] In addition to describing the suspect as a migrant worker, the victim also gave other physical descriptors of the suspect. She gave a description of his height range, age range, build and facial hair. The respondent's explanation for conducting a DNA canvass

of all migrant workers in the area, even if they did not match this description, includes the frailty of identification evidence. The respondent explains that the DNA canvass was necessarily broad because the investigation team “simply could not trust the accuracy of the victim’s physical description of the assailant”. Based on the evidence discussed below, I find this explanation is not a credible non-discriminatory explanation on the evidence for disregarding the physical description entirely.

[127] D/S Gonneau, D/S/S Raffay and D/C Nolan all testified that they were aware that the victim had described the assailant as a migrant worker but had also provided a physical description of him. However, with their many years of investigative experience, they all understood that identification of general characteristics in a violent assault of this nature could be problematic. D/S Gonneau testified that she understood generally that identification by victims of trauma could be unreliable, and that the victim’s physical description of the assailant in this case could be unreliable, particularly given the violence and threats of murder. The officers testified that they knew that they needed to account for the “real possibility” that her description may not be accurate. Their evidence is that since they understood that the assailant may not fit the victim’s description, “the DNA canvass had to be broad enough to cover potential suspects”.

[128] The respondent relies on several judicial decisions and other authorities, which have warned that eyewitness identification is notoriously and inherently unreliable. The respondent notes that it can lead, and has led, to wrongful convictions. These concerns are beyond dispute in the context of basing convictions in a criminal proceeding on eyewitness identification. The courts have called for considerable caution by a trier of fact in relying on that evidence.

[129] I accept the police officers’ testimony that suspect descriptions from witnesses, including from the victim of a violent crime as in this case, may be inaccurate. I accept that the violent nature of the sexual assault, threats, the victim’s consumption of alcohol, and the limitations on her opportunity to observe, are all factors which may have limited the reliability of the description. I accept that the person identified was a stranger and involved cross-racial identification which are factors that courts have stated limit the

reliability of eyewitness testimony. I accept that there was a lack of any very obvious physical indicator observed by the victim, such as tattoos, scars, or amputations. I also accept that it would be reasonable for the police to account for, in its investigation, the real possibility that the description may not be entirely accurate. However, as D/C Vanbussel acknowledged in cross-examination, police routinely use suspect descriptions in their investigations and routinely rely on suspect descriptions to apprehend and arrest suspects. Why then was the physical description of the suspect not used at all in this case for the purpose of deciding who would be subject to the DNA canvass? I turn now to an analysis of the specific evidence about the suspect description.

The Victim's Physical Description of the Suspect

[130] The evidence surrounding the victim's description of the assailant in her formal Statement is important.

[131] The assailant was in the victim's home for at least 45 minutes which is a significant amount of time to be able to observe him. However, there were limits on her ability to observe during that time. In her Statement, the victim stated that they were "tussling" and he tried to keep her turned around and not have her look at him. She said that the assailant was wearing a hoodie; however, she also said that she could still see part of his face. She was blindfolded for much the time; however, she said she peaked out from the blindfold. She stated that during the sexual assault, the assailant got up more than once and she was scared to look, although she "brought [the blindfold] down a little bit" so she could peak a bit, and later when he got up again, she said she was "sort of peaking out from under the bandana". She said she did not want to anger him by taking off her blindfold. As can be seen from this part of her Statement, the victim was very careful and particular in the information she gave, including information about the limitations on her observations. On the whole, although there were limits, she still had the opportunity to observe and provided her observations to the police.

[132] I next explore the specific information the victim gave about the physical descriptors that the police officers did not rely on. In her Statement to police, she provided

the suspect's height range of 5'10" to 6'. Her Statement indicates how she arrived at this range. When asked if she had any idea of his size, she said yes because she was "standing up in front of him" when she put her cigarette on his chest. She stated that the assailant was taller than her (5'6.5") and around the height of her ex-boyfriend (6'). The victim said that the assailant was very muscular with no excess fat on this chest. She indicated that she was able to give this description because during the assault she grabbed his chest at one point. She described the assailant as having no facial hair. She described the assailant as being in his mid to late 20's. As can be seen, the victim gave ranges when she described height and age to account for the obvious fact is that it is hard to pinpoint those descriptors with accuracy. Further, when the victim was not sure about a particular detail, she said so.

[133] I find that the information provided by the victim described above has significant specificity and reliability which undermines the respondent's explanation for the broad scope of the DNA canvass that it simply could not trust the accuracy of the victim's physical description of the assailant.

[134] The respondent submits that it would have been negligent had it missed the assailant by unduly narrowing the scope of the DNA canvass. However, there is no evidence that the OPP, at the time, even considered each additional physical descriptor and how each could be reasonably incorporated into the way the DNA canvass was implemented. There is nothing in the officers' contemporaneous notes that might help explain their approach either. There is no evidence that the OPP, to address the potential for inaccuracies in the description, made any attempt, or even considered attempting to develop a reasonable range or set of parameters related to some or all of these physical descriptions on which to base the DNA canvass. Instead, the physical descriptors provided were ignored and were not incorporated in any way into how the DNA canvass was implemented.

Composite Sketch

[135] When the victim gave her Statement to the police, she was hesitant when asked if she was willing to meet with a composite sketch artist. She said, “I honestly I don’t have enough I really don’t ... with the lighting being low as well plus his hoodie and sorta shadows and the very fact that he had such dark skin made it hard for me to make out his features just by quick looks and what I did see honestly I don’t think I would do any good with it I really don’t”. The police told her that it may surprise her with what she does have, and the victim ultimately met with a sketch artist. I find that this expression of doubt by the victim herself about making out his features specifically applies to her description of his facial features. Overall, I do not find this expression of doubt meaningfully supports the credibility of the respondent’s explanation for not relying on the suspect description at all for the purpose of the scope of the DNA canvass.

[136] Related to this, I note that both parties have referred to the “ratings” and/or notes on the composite sketch as evidence of the reliability, or lack thereof, of the victim’s description of the suspect. I did not hear from the victim or the composite sketch artist directly about the meaning of these ratings and notes and without more context about this, I have decided to give these ratings and notes on the composite sketch no weight. I find the victim’s Statement described above to be the most reliable evidence relating to the suspect description.

OPP’s Reliance on the Suspect Description in Other Aspects of the Investigation

[137] There are three examples in the evidence of the respondent relying on the suspect description provided by the victim in the course of its investigation: (i) the media release, (ii) the composite sketch, and (iii) in ruling out suspects. I find that these examples undermine, to some degree, the credibility of the respondent’s explanation for not relying on the suspect description at all for the purpose of the scope of the DNA canvass.

[138] The evidence is that the police put out a media release to try to engage the public’s assistance to solve the crime. The media release included the victim’s physical

description of the assailant: “The male is described as: Black male, 78cm (5’10) – 183cm (6’) in height with a muscular build, no facial hair, and mid to late 20’s in age.” Including the suspect description in the press release to try to elicit the public’s assistance to solve the crime is evidence that the police had some confidence in the suspect description.

[139] The evidence is that the police showed the composite sketch to farm owners during its investigation as an investigative aid, which is an indication that they found the victim’s description of the suspect to have sufficient reliability to be used as part of its investigation. The respondent submits that the composite sketch was merely an investigative aid, the accuracy of which was unknown. I accept this, but nevertheless I find that its use shows to some degree that the police considered the victim’s description to have some reliability.

[140] Another example of evidence that undermines the credibility of the respondent’s “frailty of identification evidence” explanation relates to one of the migrant workers, Mr. Persad, who refused to provide a DNA sample on religious grounds. As stated above, the Canvass Form describes Mr. Persad as East Indian, 5’2”, 100 lbs., 40 years old, with long black hair and a goatee. (The Canvass Form for Mr. Persad also shows that he told D/C Nolan that he was at home on the night of the sexual assault and provided the name of a housemate who could verify that he was at home.) D/C Nolan testified in cross-examination that they asked Mr. Persad for a DNA sample without checking his alibi, even though based on his physical description it was “very unlikely” that he could be the suspect. D/C Nolan testified that he was not concerned that Mr. Persad refused to give his DNA because he did not match the description of the suspect. I find that it is inconsistent for the victim’s description of the suspect to be reliable enough to rule Mr. Persad out as a suspect *after* he refused to provide a DNA sample, but not *before* he was asked to provide a DNA sample.

[141] On balance, based on this evidence described above, I do not accept this part of the OPP’s explanation for disregarding the physical description entirely, that they simply could not trust the accuracy of the victim’s physical description of the assailant and therefore the DNA canvass was necessarily broad.

Urgency

[142] The OPP relies on urgency to explain the decision to conduct a DNA canvass and to explain the scope of the DNA canvass. The respondent's urgency explanation includes concerns about timing and logistics of the investigation since the migrant workers would soon be returning to their home countries, the seriousness of the crime, public safety concerns and a lack of other investigative leads.

[143] In support of the respondent's urgency explanation, D/S Gonneau, D/S/S Raffay and D/C Nolan all testified that they knew that the end of the harvest season was approaching and migrant workers would soon be returning to their home countries, potentially to never return. D/S Gonneau testified that she was worried about how the OPP would be able to "deal with such a large number of individuals in a short period of time".

[144] D/S/S Raffay and D/S Gonneau testified that there was a significant risk to public safety from a violent sexual assault of this nature. D/S/S Raffay testified that the suspect's *modus operandi* indicated that the suspect may have done this before. Also, the officers explained that there was a lack of other evidence to assist the investigation. It was unlikely that traditional databases such as the Sex Offender Registry would offer any evidence and there were no independent eyewitnesses.

[145] In closing submissions, the respondent described the situation as unique with a limited amount of time to get it right. The respondent submitted that the investigative team needed to interview as many potential suspects or witnesses as possible, as quickly as possible, and therefore the DNA canvass was necessarily broad.

[146] In considering whether the OPP's explanation of urgency is credible on the evidence, I am again mindful that the Tribunal's role is not to delve into the appropriateness of policing techniques or the correctness of the exercise of police discretion, except to the extent that the use of those techniques or the exercise of that discretion violates the *Code*.

[147] I am satisfied based on the evidence discussed below that there was urgency which explains the DNA canvass, in part. It is clear on the evidence that the police were investigating a very serious crime and there were public safety concerns. It is also clear on the evidence that the migrant workers were going to be leaving the country which would create a challenge for the OPP's investigation.

[148] The applicant and the OHRC pointed to evidence to try to undermine the respondent's urgency explanation as the basis for the DNA canvass and/or to prove that it is pretextual.

[149] The applicant and the OHRC rely on the evidence that at the time that the decision to conduct the DNA canvass was made, the OPP did not know for certain if a crime scene DNA profile would be generated, and did not know how long it would take to find that out from the CFS. The respondent submits that time was of the essence to collect DNA samples, provide them to the CFS for analysis and review the results. The respondent further submits that it could not wait for results before commencing a DNA canvass.

[150] Without a crime scene DNA profile (which was a possibility), the taking and processing of approximately 96 DNA samples, which drew on significant resources, would serve no purpose. I heard no specific evidence on the likelihood of that possibility, but based on the totality of the evidence, I find that the urgency of the migrant workers soon leaving and the logistics of the investigation credibly explains not waiting until the OPP knew for certain that a crime scene DNA profile would be generated.

[151] The applicant and the OHRC also rely on the police officers' testimony in cross-examination that time is always of the essence in serious crime investigations because there is always a concern that suspects may leave the area. The applicant and the OHRC rely on the evidence that the decision to conduct the DNA canvass was made very quickly, before the officers knew exactly how many migrant workers worked in the area, how long it would take for the CFS to process all of the samples that would be collected from the migrant workers, or when the migrant workers were scheduled to leave. The applicant submits that at the time the decision to undertake a DNA canvass was made, it was

entirely unclear whether it could reasonably be expected to speed up the investigation. The applicant relies on the evidence that the OPP focussed solely on obtaining DNA samples, when it could have verified the alibi information and followed up on potential leads obtained from interviewing the migrant workers.

[152] In response to this, I accept the respondent's submission that an analysis of how long the investigation would have taken without using a DNA canvass as an investigative tool would be speculative. D/C Nolan testified that the initial focus was on obtaining DNA samples and the information collected on the Canvass Forms could be used down the road. It is speculative to suggest that following up on information provided in the Canvass Forms (e.g. information about alibis or individuals who were not in the bunkhouse during the time of the assault) or sharing the composite sketch or suspect description with the migrant workers would have led to the identification of Cooper in the same amount of time or faster. In the context of the urgency presented in this case, and the decision to conduct a DNA canvass, I accept the respondent's explanation that there were concerns about being able to deal with a large number of individuals in a short period of time.

[153] The OHRC submits that even if the urgency of the investigation is established on the evidence, a decision to conduct the DNA canvass because the migrant farmworkers may be returning to their home countries soon "is a decision based expressly on the fact that the workers are not from Canada". The OHRC submits that this links their treatment to their place of origin, and helps establish a claim of discrimination, and is not a non-discriminatory explanation. I agree that the OPP's explanation of urgency itself links the adverse treatment experienced by Mr. Logan and the migrant workers to the annual cycle of circular migration identified by Dr. Hennebry. As migrant workers under the SAWP, they work in Canada for up to eight months and return home at the end of the harvest season. Explaining the DNA canvass on the basis of their return home at the end of the harvest season links the DNA canvass to Mr. Logan's place of origin, a protected *Code* ground. Nevertheless, this can be a non-discriminatory explanation for the DNA canvass, depending on the evidence as a whole.

[154] The evidence is that the migrant workers were in fact going to be leaving the country soon and the police knew this. I accept on the evidence that this served to limit the time the police had to engage the migrant workers in its investigation. However, urgency (even in combination with the concern about inaccuracies in the suspect description) does not fully explain why the OPP did not consider each additional physical descriptor and how each could be reasonably incorporated into the way the DNA canvass was implemented. I refer here back to the reasons above in relation to the Frailties of Identification Evidence section.

[155] Finally, urgency is not a credible non-discriminatory explanation for the manner in which the police sought DNA samples on a voluntary basis from the migrant worker community. The issue of the farmworkers' vulnerabilities in the context of the voluntary DNA canvass is discussed next.

Consent

[156] A DNA canvass is premised on obtaining voluntary and informed consent from each individual before taking a DNA sample. When D/S Gonneau was asked in cross-examination about the broad scope of the DNA canvass, she testified in part: "...this was a consensual DNA canvass, so it was going to be done to the population that was in proximity and had the opportunity to commit the offense." She later testified: "...for 99% of the people there, they were not going to be our suspect. So, we would go by way of consent and ask everybody. We would ask everybody." It appears from this evidence that the voluntariness of the DNA canvass is part of the explanation for the scope of the DNA canvass.

[157] The respondent asserts that the investigative team was careful to ensure that it received consent from each individual before taking a DNA sample. The respondent submits that Mr. Logan's consent was informed and voluntary. In contrast, the applicant and the OHRC submit that the OPP failed to take precautions to protect the rights of the migrant farmworkers and Mr. Logan was unable to provide voluntary and fully informed

consent. Further, the applicant submits that the workers' vulnerabilities were beneficial to the OPP in securing the compliance of the migrant farmworkers in the DNA canvass.

[158] Based on the evidence and for the reasons discussed below, to the extent that the respondent's explanation for the voluntary DNA canvass includes that the respondent was careful to ensure that it received consent from each migrant worker, I find this not to be a credible non-discriminatory explanation for the DNA canvass. I find that the OPP did not adequately take the migrant workers' vulnerabilities into consideration when conducting the voluntary DNA canvass. In conducting the DNA canvass in the manner it did, the migrant workers' vulnerabilities, which are rooted in the intersectionality of *Code* grounds raised in the Application, likely helped the OPP obtain the consent of Mr. Logan and the other migrant workers to provide their DNA sample.

[159] A critical aspect of this case is that the OPP's request for a voluntary DNA sample was being made in the context of a highly vulnerable racialized community. Significant testimony from Dr. Hennebry is that migrant workers are tied to a single employer under the SAWP and employers are empowered to fire and deport migrant workers without reason at any time, creating a power imbalance in the employment relationship. Layered onto this precarious employment and control by their employer, is that most SAWP workers are men from poor households who often have low levels of education, are socially isolated due to the structure of the SAWP, and face systemic barriers in protecting their legal rights and accessing justice.

[160] In *Hosein at para. 25*, the Interim Decision on delay, the Tribunal heard similar expert opinion evidence (from a different expert) to what I heard from Dr. Hennebry. The Tribunal determined that the applicants as migrant workers are exceptionally vulnerable and have barriers that limit their ability to assert their rights in the workplace. The Tribunal stated that they live in a climate of fear of losing their livelihood, including immediate repatriation without any appeal process, if they are deemed to be assertive by their employer. These findings are consistent with the evidence of Dr. Hennebry heard in this case which I accept.

[161] Mr. Logan's testimony illustrates these vulnerabilities raised by Dr. Hennebry in her evidence. Mr. Logan grew up in Jamaica where he completed high school at the age of 18. There is no dispute that Mr. Logan can read and write English, but his testimony was that English is a little bit of a challenge for him sometimes. While working under the SAWP, Mr. Logan lived in a bunkhouse on the farm. He did not have his own means of transportation or access to a computer. He had no personal phone. He shared access to a landline with other migrant workers located in his bunkhouse. He had no close personal relationships with anyone in Canada.

[162] Dr. Hennebry testified that the power imbalance between the migrant workers and their employer creates a "climate of fear" in which workers would feel like they had little choice but to provide a DNA sample when asked by "employers or law enforcement". She testified that asking for a DNA sample under the conditions of the SAWP amounts to coercion and does not enable workers' free and informed consent. She testified in cross-examination that if a worker chooses to assert their rights, including refusing a DNA sample, the program enables the employer to terminate their employment. She testified on cross-examination that under the SAWP it would be very challenging to create conditions that would enable free and informed consent.

[163] Dr. Hennebry acknowledged that there are individual and systemic level factors that determine whether someone can make a free and informed consent. She agreed with the assertion put to her that there are differences in migrant workers' literacy and language skills and "where they are at in terms of their own experience in Canada" that are individual factors. In re-examination, she stated that systemic factors in the SAWP program (closed work permit, onsite living, naming, and others) make it very difficult for a worker to have "free" consent and individual barriers (lower levels of education, lack of access to information before coming and while in Canada) that make it very difficult for a worker to have "informed consent". When asked to differentiate between the power imbalance between the migrant worker and the employer versus the migrant worker and the police, she noted that they are different but in both cases there is definitely fear. With respect to the power imbalance with the police, she noted that any kind of legal infraction

can also lead to removal from the program and to return to their country of origin. I accept this testimony of Dr. Hennebry. Her testimony makes sense given the structure of the SAWP and is consistent with Mr. Logan's testimony about his lived experience.

[164] The respondent submits in its closing submissions that it does not dispute the existence of systemic barriers facing migrant workers in dealing with their employers. In fact, D/C Nolan testified that he knew that the migrant workers relied on their employment to remain in Canada, and he understood that the nature of the employment relationship between the migrant workers and their employer put them in a precarious position.

[165] The evidence discussed below shows that while the police certainly took some positive steps to obtain consent, the police did not adequately take the migrant workers' vulnerabilities into consideration when requesting their DNA on a voluntary basis. As a result, the evidence discussed next suggests that the migrant workers' vulnerabilities likely benefitted their investigation based on the way it was executed.

[166] It is highly significant evidence that the police organized the DNA canvass of the migrant workers with the assistance of their employers and on the employers' property. Mr. Logan's testimony addresses his particular experience with his employer's involvement in the DNA canvass. On the first day of the DNA canvass, his employer approached him and others while they were working in the field and instructed them to accompany him in his vehicle. The employer told them that a woman had been raped and that they needed to take a DNA test to clear their names. The employer drove the group to another location on the farm where a number of unmarked police vehicles were present. The police conducted the DNA canvass on farm property, in the back of these unmarked police vehicles, with the employer nearby and aware of the DNA canvass. The officers asked each migrant worker individually to enter one of the vehicles at which time they explained the nature of the investigation.

[167] During the request for DNA the officers spent about five minutes with each migrant worker reading out the Consent Form, explaining the voluntariness of the DNA request and obtaining their consent. D/S/S Raffay testified that to ensure it was accurately

captured, he directed that the process of consent be audio recorded. There is no question that the Form clearly indicates that the individual is not required to provide a DNA sample. The Consent Form included (excerpts only):

- I am being asked to voluntarily give a sample of my DNA to determine my involvement, if any, in the sexual assault.
- I have been advised and I understand that the results of such an examination may be given in evidence in any and all criminal proceedings against me and 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 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.
- I have been advised that 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.
- I understand that I am under no obligation to provide a sample.
- The *Criminal Code* says that samples of bodily samples 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.

[168] As can be seen from the above, the Consent Form includes advising the migrant worker that they have the right to retain and instruct counsel without delay, to telephone any lawyer and speak to that lawyer in private and to obtain free advice from a legal aid lawyer. The police officers read out the 1-800 phone number of Legal Aid Duty Counsel “for free, private legal advice right now.” However, there was no phone offered or reasonably available to Mr. Logan to call a lawyer, or to call anyone else for that matter, to discuss the police request. There is no evidence that the OPP considered the barriers facing the migrant workers in exercising this right to counsel, such as the likelihood of

migrant workers having access to a telephone, their level of education and language skills, and the fear they may have in exercising this right. There is no evidence that any of the 96 migrant workers exercised their right to counsel, despite the content of the Consent Form that was read out to them.

[169] D/C Nolan testified that after he stopped recording the conversation with each migrant worker about the Consent Form, he told each of them, “If you’re walking between the cruiser and going to the van and you decide not to provide a sample, you just turn around and you walk right back to your bunkhouse.” He testified that he said this to make sure that they understood that this was totally voluntary. He also testified, only speaking for himself, that when he conducted the DNA canvass, he told each worker that this would not affect them coming back next year. Even if D/C Nolan said this to every migrant worker he spoke to, there is no evidence that the other officers involved in the DNA canvass also gave this same message to the migrant workers. Also, given the purpose of the DNA canvass, if a migrant worker walked to his bunkhouse without providing a sample, it may cause the police to have a heightened suspicion about that individual’s involvement in the crime. Further, given the characteristics of the SAWP and the employer’s involvement in the DNA canvass, I am not satisfied that the worker could reasonably rely on D/C Nolan’s advice that this would not affect them coming back next year.

[170] The respondent questions the credibility of Mr. Logan’s testimony that giving the DNA was not voluntary, considering the content and tone of the audio recording, and his clear understanding of the request made by the OPP. The audio recording includes the following exchange after D/C Vanbussel read the part of the Form that says “I understand that I am under no obligation to provide a sample”:

Officer: Do you know what that means?

Mr. Logan: Could you explain that?

Officer: That you don’t have to give me one.

Mr. Logan: I’m willing to give it.

[171] There is no question that Mr. Logan signed and initialed the Consent Form, confirming that he agreed to provide a DNA sample and that he had not been overtly pressured into doing so. He is literate and expressed no concerns or reluctance to the investigative team. On cross-examination, Mr. Logan acknowledged that the police officers did not threaten him in any way, did not tell him that his employment would be jeopardized or that he would have to leave Canada if he refused. He agreed that the police officers wanted him to understand the Consent Form, that he understood what he was being asked to do, and that they were very friendly with him. He agreed that he was offered the opportunity to refuse consent. This is conduct that one would reasonably expect from the police in these circumstances. There is no suggestion or evidence of overt pressure tactics. While all of this evidence weighs in favour of a finding that Mr. Logan's consent was voluntary, what is critical here is the impact of the employer's involvement in the DNA canvass of this highly vulnerable group.

[172] There is no suggestion that the police told or suggested to the employer that there should be consequences to the migrant workers for not co-operating. However, Mr. Logan testified that he was worried about what his employer might do if he did not consent, that he might be out of a job for the following season, and that he would lose "all the financial help to help his family back home." He testified that although he did not wish to provide a sample of his DNA, he agreed to do so in an effort to appease the OPP and his employer. It was important to him to avoid any appearance that he was being uncooperative with the investigation. His testimony was, "I want to clear my name, but it wasn't about clearing my name. It's about what will happen if I don't take it."

[173] Mr. Logan's testimony is consistent with Dr. Hennebry's testimony described above that there is a power imbalance between migrant workers and the "climate of fear" in which workers would feel like they had little choice but to provide a DNA sample. Mr. Logan's testimony is also consistent with the involvement of his employer in the DNA canvass bringing him in from the field to meet with the police, telling him the purpose of the DNA canvass, and the letter from his employer to the police that he decided not to bring back three of the migrant workers who refused to provide DNA samples. Even

though there is no evidence that the police told the employer which workers refused to provide a DNA sample, this evidence from the employer supports Mr. Logan's testimony about his employer's expectation that they cooperate and his concern about what would happen if he did not. I find that the fear of losing his job and the limitations on his ability to assert his rights took away any real choice from him. Based on the totality of the evidence, I accept Mr. Logan's testimony to be credible that providing his DNA was not voluntary. I make this finding on a balance of probabilities despite the fact that Mr. Logan signed the Consent Form and clearly stated on the audio recording that he would give his DNA, because he had no real power to choose in these circumstances.

[174] To reach this finding, I do not find it necessary to consider other aspects of Mr. Logan's testimony which the police suggests gives reason to question Mr. Logan's overall credibility (i.e. the disputed evidence about the order of the DNA canvass and the arguably inconsistent evidence about Mr. Logan's height). A Tribunal is entitled to accept or reject some, all or none of a witness' evidence. See *R. v. R.E.M.*, 2008 SCC 51 at para. 65. In assessing Mr. Logan's credibility related to the voluntariness of the DNA sample, I do not need to assess the credibility or reliability of his testimony on unrelated facts. Further, my overall determination of whether discrimination occurred in this case does not turn on those facts.

The Success of the DNA Canvass

[175] The OPP submits that the DNA canvass was responsible for the arrest and conviction of Cooper and this forms part of the OPP's explanation for its conduct. D/S/S Raffay testified that he is convinced that if the OPP had not conducted a voluntary DNA canvass, they would not have been in a position to identify Cooper, he would have returned to his home country, and the crime would have remained unresolved.

[176] The applicant submits that Cooper was not caught by the DNA canvass; rather, it was his lies to police that attracted increased attention on him and simply speaking to him would have led to the same result. The applicant asserts that in any event, this is irrelevant

because the success of the DNA canvass cannot be used to justify discriminatory conduct.

[177] It is not necessary for me to conduct an analysis of the evidence to determine whether the DNA canvass directly or indirectly led to Cooper's arrest. If the DNA canvass was discriminatory and in violation of the *Code*, the success of the DNA canvass does not justify the conduct. In other words, the end cannot justify the means. See *Heath v. Toronto Police Services Board*, 2012 HRTO 2364 at para. 18.

DNA Samples from Materials at the Scene Might be Linked to Someone other than the Assailant

[178] Part of the OPP's explanation for requesting DNA samples from all migrant workers in the area is that DNA samples from materials left at the crime scene might be linked to someone other than the assailant.

[179] I find that this justification for the scope of the DNA canvass is not a "non-discriminatory" explanation. If this were a non-discriminatory explanation, one would reasonably expect the OPP to also ask for DNA samples from the White farm supervisors who might be linked to materials left at the crime scene, which the OPP did not do.

DNA Canvasses have been found to be Lawful

[180] The respondent relies on *Osmond* as an example of the courts finding a voluntary DNA canvass limited to proximity (i.e. a particular geographic area) to be a permissible investigative technique. In that case, the police conducted a voluntary DNA canvass of all young men in a small community where a young girl was sexually assaulted and murdered. I do not find *Osmond* to be particularly helpful to the discrimination analysis in this case. The applicant and the OHRC are not claiming that a DNA canvass may never be used to investigate a crime. The issue is specific to whether race, colour and/or place of origin were factors in the OPP's DNA canvass in the circumstances of this case. *Osmond* is distinguishable on the facts because it does not appear that there were any

physical descriptors of the suspect in that case at all; the only evidence seemed to be that the suspect was likely a resident of that town.

Evidence of Differential Treatment

[181] The applicant submits that when examining whether the OPP has provided a credible non-discriminatory explanation for its conduct, it is important to examine the evidence that the police treated the White farm owners and managers differently than the migrant workers during the course of the investigation in relation to alibis, potential leads, and the composite sketch. Specifically, the applicant alleges that the OPP treated the White farmers as trustworthy and reliable, but the OPP did not give that same treatment to Mr. Logan and the other migrant farmworkers. Having considered this evidence, I am not satisfied that an inference of discrimination is more probable from this evidence than the explanation provided by the OPP.

[182] The evidence is that the police did not verify the alibis provided by the workers on the Canvass Forms, but D/C Nolan accepted an alibi provided on November 15, 2013 by a White bus driver who said that he drove approximately 50 migrant workers on his bus back to their farm about an hour's drive away on the night of the assault. The consideration of alibis in these scenarios arises in different contexts. The migrant workers subject to the DNA canvass provided alibis which required verification. The evidence indicates that the police's initial focus was on obtaining DNA samples from these migrant workers and the information collected on the Canvass Forms (e.g. alibis and potential leads) could potentially be used down the road. The CFS results eventually excluded these migrant workers as potential suspects and the police then took other investigative steps. In contrast, the White bus driver himself was serving as an alibi for migrant workers who worked much further away, at a later stage of the investigation, after the CFS excluded the migrant workers in the area.

[183] Regarding potential leads, I accept the evidence that the initial focus was to obtain DNA samples before following up on potential leads provided by migrant workers which

were recorded in the Canvass Forms. It makes sense that the police waited for the CFS results which was expected to help focus the investigation.

[184] In relation to the composite sketch, the police officers showed the sketch to the White farm owners and managers as an investigative tool, but did not show the sketch to the migrant workers when it became available on October 23 (the second day of the DNA canvass of the first farm) and did not provide them with the suspect description. It was quite possible that the migrant workers were living in close proximity or even in the same bunkhouse as the suspect, so it makes sense that the sketch could have been used as an investigative tool. However, based on the victim's suspect description, the police believed that one of the migrant workers was the potential suspect (and the farmers were not) and it also makes sense not to show the composite sketch to a potential suspect.

C. Conclusion: Is an Inference of Discrimination more Probable from the Evidence than the Respondent's Explanation

[185] I have carefully considered all of the evidence that both supports and undermines the Application in determining whether discrimination has occurred. See *Pieters* at paras. 87 and 89 and *McKay* at para. 117. I find that the applicant has satisfied the legal burden of proof of establishing on a balance of probabilities that discrimination has occurred.

[186] I have no reason to find, nor is the focus of this analysis on whether the police officers involved in the investigation intended to discriminate against Mr. Logan or any of the migrant workers or were motivated by stereotypes. The focus is on the effect of the DNA canvass on Mr. Logan and whether that effect is connected to his race, colour and/or place of origin.

[187] The OPP had to deal with a real-world policing situation with limited time to investigate a violent sexual assault, without the benefit of hindsight. I am not questioning the appropriateness or the correctness of the police investigation, except to the extent that the use of those techniques or the exercise of that discretion violated the *Code*.

[188] The finding of discrimination, as in all cases of discrimination, is highly contextual, resting on the particular facts of this case. The finding is limited to the implementation of this DNA canvass.

[189] To summarize what has already been established above, I find that the OPP's explanation credibly justifies on the evidence why they decided to focus their investigation on the migrant farmworkers in the area and why they decided to conduct a DNA canvass. The OPP has credibly explained on the evidence why they believed the assailant was a migrant farmworker based on the suspect description and the proximity of farms in the area. The OPP has credibly explained on the evidence why there was urgency to the investigation because it was near the end of the harvest season when the migrant workers would soon be leaving the country. The OPP has credibly explained on the evidence that a DNA canvass was an appropriate investigative tool in the circumstances of this case. Whether the OPP could or should have used other investigative techniques in the circumstances of this case is speculative and delves into a consideration of the appropriateness of the investigation which is beyond the scope of my analysis.

[190] The finding of discrimination is based in part on a nuanced consideration of how the police relied on race and related *Code* grounds, in the context of the suspect description they had in this particular case. The victim identified her assailant as a migrant worker, based on his race, skin colour, accent, and the fact that migrant workers who lived and worked in the area frequently walked by her home. *Code* grounds – race, colour and place of origin - formed a reliable part of the suspect description. I agree with the statement in the OHRC Policy cited above that when race is part of a suspect description, the police can rely on race (and related *Code* grounds) to select people for investigation, depending on how it is used. In other words, race and related *Code* grounds can form part of a credible non-discriminatory explanation for a police investigation in certain circumstances.

[191] A critical part of the factual context in this case is that over and above identifying the assailant as a migrant worker, the victim provided additional information in her description of the migrant worker (height, build, age, facial hair). The police did not

consider any of the additional physical descriptors and did not consider how they could reasonably incorporate any of them, in any way, into how the DNA canvass was implemented. Instead, all migrant workers were subjected to the same investigation. As a result, race and related *Code* grounds were the sole or predominant factors in the investigation, to the exclusion of all the additional physical descriptions that were available.

[192] For reasons explained above, I accept the respondent's explanation that they had to account for the possibility that the suspect description might not be accurate and I accept that they had a limited window since the migrant workers would be leaving the country. However, even accepting this, I find the respondent's explanation for not considering any of the additional physical description at all in the implementation of the DNA canvass, not to be credible on the evidence.

[193] The problem with not considering the additional information that the police had becomes apparent through the evidence that there were many migrant workers affected by the DNA canvass who so obviously did not reasonably match the suspect description. There is evidence, discussed above, of migrant workers who were asked for a DNA sample even though they were far too short, too heavy, too old, and/or had too much facial hair, to reasonably match the description. Again, one such extreme example is Mr. Persad (5'2", 100 lbs., 40 years old, with long black hair and a goatee, described as East Indian). In the context of these migrant workers who visibly stand out, and are a clearly differentiated minority group from this rural White community, one can readily see from this evidence how relying solely or predominantly on their migrant worker status in selecting them for investigation of a crime when additional information was available, subjected them to over-investigation by police.

[194] The police have wide discretion over the conduct of their investigations. However, in this case, based on the suspect description they had, they were required to do more than act only on race and related *Code* grounds; the police were required to consider the additional information they had. By not doing so, in the particular circumstances of this case, they exercised their discretion in violation of the *Code*. It is important to recognize

that in other factual contexts, race, colour, place of origin and related *Code* grounds may amount to valid, non-discriminatory criteria in a police investigation, as stated above.

[195] It is not my role to determine how the police could or should have considered the additional information in the suspect description and incorporated it into their investigation, or what reasonable margins or parameters could or should have been put in place to select migrant workers for the DNA canvass. My role is limited to determining whether the applicant has satisfied the legal burden of proof of establishing on a balance of probabilities that discrimination occurred.

[196] The DNA canvass was based on requesting consent from each migrant worker for a DNA sample. The finding of discrimination in this case is based in part on a consideration of the way in which the police tried to obtain DNA samples on a voluntary basis from this highly vulnerable racialized community. To summarize what has been established above, I have found based on Dr. Hennebry's and Mr. Logan's testimony that the migrant workers' precarious employment and immigration status impacted Mr. Logan's ability to assert his right not to provide a DNA sample. When I examine the evidence about the way in which the DNA canvass was conducted in this case, I find that conducting a voluntary DNA canvass of this highly vulnerable group, without taking any steps to address their vulnerabilities, had an adverse impact on Mr. Logan because of his migrant worker status. His migrant worker status is linked to his race, colour and place of origin.

[197] For all of these reasons, when I weigh all of the evidence, I find on a balance of probabilities that the implementation of the DNA canvass, on the facts of this particular case, created an adverse impact and was discriminatory in its effect because of race, colour and place of origin. On this basis, in the conduct of the OPP's DNA canvass, I make a finding of discrimination because of race, colour and place of origin, contrary to section 1 of the *Code*.

REMEDY

[198] Section 45.2 (1) of the *Code* provides that if the Tribunal determines that a party has infringed a right of another party, it may make the following orders:

1. An order directing the party who infringed the right to pay monetary compensation to the party whose right was infringed for loss arising out of the infringement, including compensation for injury to dignity, feelings and self-respect.
2. An order directing the party who infringed the right to make restitution to the party whose right was infringed, other than through monetary compensation, for loss arising out of the infringement, including restitution for injury to dignity, feelings and self-respect.
3. An order directing any party to the application to do anything that, in the opinion of the Tribunal, the party ought to do to promote compliance with this Act.

[199] This Decision deals only with the applicant's request for monetary compensation for loss arising from the infringement of his rights. The parties have agreed to bifurcate the issue of liability and monetary compensation from the request for non-monetary and public interest remedies.

[200] Mr. Logan seeks \$30,000 as compensation for his inherent right to be free from discrimination and for his injury to dignity, feelings and self-respect. The OPP submits that monetary damages should be no higher than \$2,000.

[201] Based on all of the facts before me, I find it reasonable to award \$7,500 in compensation for injury to dignity, feelings and self-respect for the discrimination in this case.

[202] In determining what level of compensation to award, the Tribunal typically relies on a number of factors set out in *Sanford v. Koop*, 2005 HRTO 53, including the applicant's humiliation and hurt feelings, the loss of self-respect, dignity, self-esteem, confidence, the experience of victimization, the vulnerability of the applicant, and the seriousness, frequency and duration of the offensive treatment. The Divisional Court has

recognized that these are among the factors to be considered in setting the compensation amount. See *ADGA Group Consultants Inc. v. Lane* 2008 CanLII 39605 (ON SCDC) at paras. 152 to 154 (“*ADGA*”). Such an award includes recognition of the inherent value of the right to be free from discrimination. The Divisional Court has also recognized that the Tribunal must ensure that the compensation amount is not set too low, since doing so would trivialize the social importance of the *Code* by effectively creating a “licence fee” to discriminate. See *ADGA* at para. 153. It is important to note that the purpose of a remedial award is to restore an applicant, to the extent a monetary award can do so, to the position they would be in if the discrimination had not occurred. A remedial award is not intended to punish a respondent. See *Piazza v. Airport Taxicab (Malton) Assn.*, 1989 CanLII 4071 (Ont. C.A.).

[203] I have considered Mr. Logan’s particular experience in response to the DNA canvass. His testimony, which I accept, is that he felt humiliated, defeated and saddened by his experience. He expressed worry that the OPP may carry out a similar, race-based DNA sweep on migrant farmworkers in the future. He also remains worried about what use the OPP or others may make of his personal information (for example, his name, date of birth, description, and address) and/or his DNA profile (the electronic data collected from the sample).

[204] I will briefly address the respondent’s submission that based on *Hosein*, the Interim Decision on delay, at paras. 109-114, and the Interim Decision on Deferral, at para. 17, issues relating to retention of Mr. Logan’s DNA profile or personal information are not before this Tribunal and therefore his concern about those matters cannot be considered in the compensation assessment. In *Hosein*, the Tribunal held that the passive retention of personal information is not an incident of discrimination, as there are no allegations of use, harm or disadvantage materializing from it. Indeed, I make no finding in this decision that the retention of information was discriminatory. However, that does not mean that this fact cannot form part of the remedy assessment if it had an impact on Mr. Logan’s dignity, feelings and self-respect.

[205] I have considered the amount of compensation awarded by the Tribunal in other cases of racial discrimination by police, referred to by the parties. Each case is unique. *Maynard* and *JKB*, 2020 HRTO 1040 (decision on remedy) involved physical altercations with the police and have compensation awards at the higher end of the spectrum of \$40,000 and \$30,000 respectively. I distinguish *Maynard* on the basis that being held at gun-point by a police officer in that case was the applicant's watershed life experience. I distinguish *JKB* on the basis that it involved the police handcuffing a child. In this case, the police were polite to Mr. Logan and the harm to him was not physical in nature (a buccal swab is quick and not particularly invasive in the physical sense); however, the taking of one's DNA is a significant intrusion of personal privacy. Other cases of heightened investigation or scrutiny by police have awarded damages ranging from \$10,000 to \$20,000. See *Nassiah*; *Phipps*, 2009 HRTO 1604 (decision on remedy); *Dungus v. Toronto Police Services Board*, 2013 HRTO 36; and *Briggs v. Durham Regional Police Services*, 2015 HRTO 1712. The award of \$5,000 in *Abbott v. Toronto Police Services Board*, 2009 HRTO 1909 is distinguishable because the applicant's contribution to the escalation of events was taken into consideration, which is not the case here. In *Pieters*, the Tribunal awarded only \$2,000 but it is not a police case.

[206] I have considered, objectively, what occurred. The police conduct may be considered objectively less serious than some of the other cases, when viewed in the complete factual matrix of the police investigation. I have found that the OPP was justified in focusing their investigation of the sexual assault on the migrant farmworkers in the area and in deciding to conduct a DNA canvass. However, I have found that while the OPP used the *Code* grounds of race, colour and place origin in this case as reliable objective criteria to conduct the investigation, the fact that they had additional criteria and acted only on race and related *Code* grounds in assessing the scope of their DNA canvass resulted in over-policing on the basis of these *Code* grounds. Although I have ultimately made a finding of discrimination because of race, colour and place of origin, the discrimination is limited to how the DNA canvass was implemented in the factual context of this case. To illustrate this point, I contrast these facts from those in *Phipps*, a case in which a police officer stopped a Black male letter carrier even though he did not match

the suspect description, i.e. White, East European men driving a vehicle. Unlike this case, in *Phipps*, colour was not an objective criterion that the police officer applied based on the suspect description, and the Tribunal in *Phipps* did not accept any aspect of the police officer's explanation for the decision to stop him.

NEXT STEPS

[207] The issue of the applicant and the OHRC's request for non-monetary and public interest remedies remains outstanding. The Registrar will arrange for a Case Management Videoconference Call to discuss reconvening for a hearing on remaining remedies.

[208] The issue of delay also remains to be determined in relation to the remaining 52 applicants, as decided by Associate Chair Grant in *Hosein*, the Interim Decision on delay. The parties are encouraged to resolve or narrow this issue.

ORDER

[209] The Application is allowed. I make the following orders:

- a. The respondent is to pay to the applicant the amount of \$7,500 as compensation for injury to his dignity, feelings and self-respect, plus pre-judgement interest at a rate of 1% per annum, running from the date of the infringement, October 22, 2013, in accordance with s. 128 of the *Courts of Justice Act*, and
- b. Post-judgment interest at a rate of 2% per annum on any amount that remains unpaid more than 30 days after the date of this decision, in accordance with s. 129 of the *Courts of Justice Act*, calculated from the date of this decision.

[210] The Registrar will issue a one-hour Case Management Videoconference Call in November 2022 to discuss reconvening for a hearing on remaining remedies.

[211] The parties are directed to discuss efficient management of the remaining issues in advance of the Call and are encouraged to try to resolve some or all of the remaining issues without a hearing.

Dated at Toronto, this 15th day of August, 2022.



Marla Burstyn
Member