Public Inquiry into the Safety and Security of Residents in the Long-Term Care Homes System

The Honourable Eileen E. Gillese
Commissioner

Commission d'enquête publique sur la sécurité des résidents des foyers de soins de longue durée

L'honorable Eileen E. Gillese
Commissaire

RULING ON A MOTION requesting the issuance of summonses

Heard in writing: March 19, 2019 (date of release)
Toronto, ON

Commissioner Gillese:

I. Overview

This is a ruling on a motion dated February 26, 2019 (the **Motion**), brought by the Ontario Association of Residents' Councils (**OARC**).

In the Motion, OARC asks that, as Commissioner, I:

1. issue a summons to each of the Woodstock Police Service, the London Police Service, and the Ontario Provincial Police (**OPP**), for information relating to disclosures made by Elizabeth Wettlaufer regarding the harming of residents and/or patients in her care, which are not outlined in Exhibit 1 produced in the Inquiry's Public Hearings (**Public Hearings**); and

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2. produce the information obtained by the summonses to the groups and individuals granted the right to participate in the Public Hearings (the **Participants**).

For the reasons that follow, I dismiss the Motion.

II. Background to the Motion

To understand the Motion and the issues it raises, some background information is essential. For that reason, I will begin by briefly outlining the facts leading to the Motion.

In the fall of 2016, Wettlaufer, then a registered nurse, confessed to having harmed or killed 14 people while she was providing them with nursing care in long-term care (**LTC**) homes or in their private home (the **Offences**). She said she committed the Offences by injecting her victims with overdoses of insulin. Police investigations followed her confession.

In early June 2017, Wettlaufer pleaded guilty to, and was convicted of, the Offences. Later that month, Wettlaufer was sentenced to life imprisonment for the Offences. Through Order in Council 1549/2017 (the **OIC**), the government of Ontario established this Public Inquiry, and named me its Commissioner, effective August 1, 2017. Broadly speaking, the OIC provides that the Commission is to inquire into the Offences and that, as Commissioner, I am to make recommendations to address systemic failings in Ontario's LTC homes system that may have occurred in connection with the Offences. The OIC establishes July 31, 2019, as the deadline for delivery of the Inquiry's final Report to the government, in hard copy and electronically, in both official languages.

The Commission conducted thorough investigations into the events that led to the Offences. The results of those investigations were made public through the Public Hearings held between June and September 2018.

In October and November 2018, as part of the process for developing the required recommendations, I engaged in extensive consultations with the Participants and other

stakeholders in Ontario’s LTC system to canvass areas that were the source of possible recommendations.

On January 5, 2018, the Commission was told that Wettlaufer had recently disclosed to correctional staff at the Grand Valley Institution for Women (where she was imprisoned) that she had attempted to harm two other residents in LTC (the **New Statement**), and that police investigations into the alleged further wrongdoing were underway.

One resident has since been publicly identified as Florence Beedall, but the second resident’s name has never been made public.

I took no steps in relation to the New Statement because paragraph 3 of the OIC expressly prohibits that. Paragraph 3 requires me, as Commissioner, to “ensure that the conduct of the Inquiry **does not in any way interfere or conflict with any ongoing investigation** or legal proceeding related to these matters” (emphasis added). To have so much as acknowledged publicly that the New Statement had been made would have been a breach of that prohibition.

In December 2018, the Commission learned that the police investigation into the New Statement was complete and that no further charges would be laid against Wettlaufer. Shortly thereafter, the media reported on the fact that the New Statement had been made.

On February 4, 2019, I held a teleconference with the Participants, setting out what information the Commission had been given about the New Statement and when. I explained that the Commission had never been given documentary disclosure of the police investigation relating to the New Statement. I further explained why neither the Commission nor I had taken any action in relation to the New Statement.

Also in early February 2019, the Participants learned that Ms. Beedall’s daughter had begun legal proceedings in November 2018, in which she sought disclosure of the relevant police records from the London Police Services Board. In those proceedings, the

London Police Services Board filed motion materials that included a redacted general occurrence report of the London Police Service relating to its investigation arising from the New Statement. This document is now in the public realm. The motion material also revealed that three police services had been involved in the investigation: the London Police Service, the Woodstock Police Service, and the OPP.

OARC wishes to see the relevant records of those three police services and brought this Motion asking that I compel their production through the issuance of summonses.

III. Who Took What Position on the Motion

The Participants and Commission counsel took the following positions on OARC's Motion.

The Ontario Nurses' Association (**ONA**) supports the Motion.

Caressant Care Nursing and Retirement Homes Limited and Caressant Care (Woodstock) (collectively **Caressant Care**) oppose the Motion.

Jarlette Health Services and Meadow Park (London) Inc. (collectively **Jarlette**) oppose the Motion.

Commission counsel oppose the motion.

Her Majesty the Queen (**Ontario**) represents several provincial entities, including the OPP. Ontario does not state its position on whether I should grant the Motion. However, it takes a position on the relief to be granted, if I were to issue a summons. Its submissions are directed at protecting the confidential information in the requested materials.

The following Participants took no position on the Motion:

- The group of victims' family members and loved ones comprised of Arpad Horvath Jr., Laura Jackson, Don Martin, Andrea Silcox, Adam Silcox-Vanwyk, Shannon Lee Emmerton, Jeffrey Millard, Judy Millard, Sandra Lee Millard, Stanley Henry Millard, and Susie Horvath;
- The group of victims' family members and a victim comprised of Jon Matheson, Pat Houde, and Beverly Bertram;
- AdvantAge Ontario;
- College of Nurses of Ontario;
- Ontario Long-Term Care Association;
- Ontario Personal Support Workers Association;
- Revera Long Term Care Inc.;
- Registered Nurses' Association of Ontario; and
- Registered Practical Nurses Association of Ontario.

Two other Participants – the Ontario Long Term Care Clinicians and the Interfaith Social Assistance Reform Coalition – did not advise of their positions on the Motion. Because they did not file submissions or otherwise participate on the Motion, I have assumed that that they take no position on it.

For ease of reference, I will refer to those who took positions on the Motion as the **Parties**.

IV. The Process for Hearing the Motion

Rules of Procedure (the **Rules)** governed the Public Hearings. The Rules were established following a formal consultation process with the Participants.

The Rules set out a process for hearing procedural motions in advance of the Public Hearings (rules 44-48). They also allow for the possibility of motions being brought during the Public Hearings themselves (rule 10). The Rules do not allow for motions to be brought after the conclusion of the Public Hearings.

The Motion was brought months after the Public Hearings had concluded. The Inquiry's public consultations had also concluded some months earlier. The bringing of a motion at this late point in the Inquiry was not contemplated by the established Inquiry process or by the Rules.

In the circumstances, I attempted to follow, as much as possible, the process in the Rules for the hearing of procedural motions. Accordingly, by letter to the Participants dated February 28, 2019 (the **First Letter**), I informed them of the following process for the hearing of the Motion:

- Participants were to file written submissions on the Motion, along with any documentation or case law on which they intended to rely, by noon on March 8, 2019;
- Commission counsel were to advise all Participants of their position on the Motion, in writing, by 4:00 p.m. on March 11, 2019;
- Any Participants wishing to respond to the submissions of the other Participants or the position of Commission counsel were to do so in writing, by 4:00 p.m. on March 12, 2019;
- Any Participants wishing to speak to the Motion were to inform the Inquiry's Executive Director by noon on March 13, 2019; and
- Oral argument on the Motion would be heard on March 14, 2019.

Counsel for OARC then advised that they were unavailable to argue the Motion on March 14, 2019, or otherwise that week. They suggested that oral argument on the Motion be scheduled for the week of March 18th. However, counsel for other Participants indicated that they were unavailable that week. As a result, the earliest possible date for oral argument on the Motion would have been in the last week of March 2019.

As I explain above, written copies of the Inquiry's final Report, in both official languages, must be delivered to the Ontario government by July 31, 2019. To meet that deadline, it was imperative that the Motion be heard and decided promptly. Accordingly, by letter

dated March 1, 2019, I advised the Participants that the Motion would be heard in writing only; the time for the Participants' response submissions was extended by one day, to March 13, 2019; and, in all other regards, the directions in the First Letter remained unchanged.

V. The Parties' Positions

A. OARC – the Moving Party

OARC's overarching submission is that compelling production of the police records is within the Commission's mandate and also in the public interest. Relying on *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97, at paras. 62-65, OARC submits that obtaining the requested documents and putting them in the public domain would serve both an investigative and social function for the benefit of the public.

OARC says that the documents it seeks are relevant to the Inquiry's mandate. It notes that in the New Statement, Wettlaufer is said to have disclosed that she injected Ms. Beedall with insulin just hours before she murdered Arpad Horvath and that this information is relevant to the "circumstances leading to the Offences." OARC submits that the Commission's mandate should not be narrowly confined to only the Offences of which Wettlaufer was convicted, particularly since the Public Hearings focused on a range of Wettlaufer's conduct, including her emotional abuse of residents, her provision of incompetent care, and her suspected theft of medication.

OARC submits that I have the power to compel the requested documents, even though the Public Hearings have concluded, whereas the Participants have no power to compel the information. OARC cites sections 4-7 and 9 of the OIC; sections 5, 9, and 10 of the

Public Inquiries Act, 2009, S.O. 2009, c. 33, sched. 6 (the **PIA 2009**); and the Rules, in support of this submission.

Further, OARC argues that obtaining the information would serve the purpose of the Inquiry because it would allow the Commission and the Participants to make an informed decision about what bearing the information has on the Inquiry. If, upon reviewing it, Participants feel the information is relevant, OARC says they should have the opportunity to make submissions about what further steps should be taken. Alternatively, OARC suggests that Commission counsel could prepare a summary of the information or I could ask the investigating police forces to report to me. It submits that any of these approaches would fulfil the Inquiry's investigative and social functions.

OARC acknowledges that some of Ms. Beedall's family members have expressed concern about the media and public interest in their mother's death but says that, while an important consideration, it cannot be determinative.

OARC contends that a similar situation arose in the Elliot Lake Public Inquiry where, nine months after the completion of the public hearings, a report was anonymously provided to the Commission. The existence of the report had not been previously disclosed to the Commission. Commissioner Bélanger made a procedural order, directing the Ontario government to serve submissions related to the report. Following receipt of those submissions, the participants were entitled to submit responses. Four of the participants did so. The Commissioner reported his conclusions about the report in an addendum in his final report.

Finally, OARC submits that procedural fairness favours obtaining the documents and producing them to the Participants. It says that the Inquiry cannot make an informed choice on how to proceed without the information and that to do nothing will leave the impression that the harm described in the New Statement is being overlooked, concealed, or ignored. It submits that an incremental approach to evaluating the new information will

allow the Commission and the Participants to make a meaningful assessment of the documents and will serve the Inquiry's functions.

B. ONA – supporting the Motion

ONA makes three key submissions in support of the Motion.

First, it says the information sought on the Motion is highly relevant and falls within the Inquiry's mandate, and that failing to obtain and disclose it would be inconsistent with Commission counsel's approach to the evidence it led in the Public Hearings.

Second, ONA recognizes that the information came to light late in the Inquiry process but observes that, at a much earlier stage in the process, Commission counsel and counsel for at least one of the homes were aware that the New Statement had been made and was the subject-matter of a police investigation. It submits that the information sought on the Motion should be provided to the Participants and that the Participants be given the opportunity to amend their written closing submissions, which they delivered at the end of the Public Hearings. ONA also suggests that the information should be given to the experts who testified at the Public Hearings so that they can determine whether it would change their testimony.

Third, ONA submits that for there to be public confidence in the work of the Inquiry, it must obtain and review this additional information.

C. Caressant Care and Jarlette – opposing the Motion

Caressant Care and Jarlette filed a joint submission in which they oppose the Motion.

As a preliminary issue, they submit that OARC's inclusion of the London Police Services Board records (the **Records)** in the Motion materials is contrary to the order of Justice Garson, dated February 5, 2019, made in the legal proceedings started by Ms. Beedall's

daughter. That order stipulates that the Records shall be used only by the parties directly involved in that litigation and for the purposes of the civil proceeding.

Apart from this preliminary issue, Caressant Care and Jarlette give six reasons for opposing the Motion. They submit:

1. the relief sought on the Motion is outside the scope of the Inquiry's mandate, which was to inquire into the Offences to which Wettlaufer pled guilty and for which she was convicted;

2. there is an absence of a foundation for the possible new crimes. No charges have been laid against Wettlaufer based on the New Statement and the Inquiry is not the venue through which the validity and truthfulness of the information in the New Statement can be determined;

3. granting the relief sought would not advance the Inquiry. The existing evidentiary record shows how Wettlaufer carried out her crimes, how she concealed them, and how systemic factors may have allowed those events to occur;

4. granting the relief sought would delay the Inquiry. Producing documents regarding new unproven allegations would trigger a fairness obligation to allow the Participants to investigate the allegations by re-interviewing witnesses, conducting fresh document searches, introducing fresh evidence, and amending their closing submissions. This course of action would significantly and needlessly delay the completion of the final Report and the implementation of its recommendations in circumstances where there is already a strong evidentiary record that was thoroughly tested through the Public Hearings;

5. granting the Motion would prejudice those Participants and witnesses who have found the Inquiry process to be stressful and emotional. These individuals have taken comfort in knowing that their participation is over, and it would be unfair

to re-immerse them in it. Further, it would unfairly focus attention on the homes in which the unproven allegations are said to have occurred, without providing a context or mechanism for exploring the events and depriving the homes of the opportunity to defend against speculation and criticism; and

6. granting the relief sought would offend the principle of proportionality in section 5 of the PIA 2009. There is little, if any, value in disclosing to the Participants documents related to fresh unproven allegations. On the other hand, re-opening the Inquiry to investigate fresh unproven allegations would threaten the integrity of the Inquiry process, delay the delivery of the final Report, and result in considerable prejudice to the homes and many of the witnesses in the Public Hearings.

D. Commission Counsel – opposing the Motion

Commission counsel submit that the principle of proportionality is inconsistent with the relief requested and requires that the Motion be dismissed.

Section 5 of the PIA 2009 requires the public inquiry to be conducted "effectively, expeditiously, and in accordance with the principle of proportionality". Commission counsel says this means that I must exercise care in deciding whether to allow for further examination of issues related to the Commission's mandate, by ensuring the issues to be investigated are reasonably relevant to the subject matter of the Inquiry and will advance the Inquiry sufficiently to warrant allocating time and resources to their pursuit. In making this submission, Commission counsel rely on E. Ratushny, *The Conduct of Public Inquiries: Law, Policy and Practice* (Toronto: Irwin Law, 2009), at p. 203.

Commission counsel contend there is little to be gained from a consideration of the police investigation materials and much to be lost by the associated delays in receiving them. They raise cautions about the value of the materials, noting that the information in them

has not been tested in any legal proceedings and no new charges have been laid as a result of it. They point out that I could not make findings of fact based on the materials, and that procedural fairness concerns would require the materials to be subjected to the same process as the evidence gathered in the investigative phase of the Commission's work. This raises the possibility that the Public Hearings would have to be re-opened. Opening the door to a potentially time-consuming process must be balanced against a consideration of what value might by added by the requested information, above and beyond what the Inquiry has already learned through its investigations.

Commission counsel say that neither OARC nor ONA has demonstrated how the requested materials would advance the Inquiry. While the information is not clearly irrelevant to the work of the Inquiry, it is removed from the Inquiry's core mandate which is the circumstances and contributing factors relating to the Offences for which Wettlaufer was convicted. A solid evidentiary record exists on which to base my recommendations, and all relevant systemic factors have been examined. When the information sought on the Motion is viewed against the evidence already vetted and produced to the public, Commission counsel say it is apparent that the requested information will not advance the Inquiry or change the factual foundation on which my recommendations rest. However, the delays associated with granting the Motion could prevent the Report from being released by the deadline.

Commission counsel also say that public confidence would not be enhanced by granting the Motion. Rather, they submit, it would be shaken by a disproportionate response to Wettlaufer's unproven disclosures, particularly since it could prevent a timely release of recommendations based on an already ample evidentiary foundation. They take issue with OARC's suggestions that refusing to grant the Motion could undermine public confidence by conveying to the public that the Commission is "not interested" in the lives of others who may have been harmed by Wettlaufer or that the Inquiry's report is more important than its social function. They say that these suggestions are unwarranted and that the timely release of the Report, with its recommendations aimed at preventing a recurrence of tragic events, is one of the Inquiry's core social functions, and is urgently

needed to address the systemic failings that allowed Wettlaufer to commit her crimes. Further, they say that the Report's timely release is essential to helping restore public trust in the long-term care system.

E. Ontario – submissions on the relief sought in the Motion

Ontario advises that the materials requested on the Motion are all in the OPP's possession so if the Motion were to be granted, only one summons, served on the OPP, would be required.

Ontario takes no position on the relevance of the requested materials but says that they contain personal health information and confidential personal information that must be protected. It observes that the OIC gives me the power to impose conditions on the disclosure of information to protect its confidentiality and also requires that I work to maintain and ensure the confidentiality of personal health information.

Ontario points to OARC's Notice of Motion, which refers to harm to two other residents. It notes that the name of only one affected resident is in the public record. Ontario says that the family of the unnamed resident asked police to keep their identities, and that of the unnamed resident, out of the media and free from any association with Wettlaufer. Ontario says that the family has been able to maintain their anonymity thus far.

In the circumstances, Ontario submits that if I were to issue summonses, I should permit the OPP to first redact the name and identity of the unnamed resident and his or her family members, and any other information that might identify them. If I were inclined to order the release of the police records without redactions, Ontario submits that the family of the unnamed resident should be given notice of that order and the opportunity to make submissions regarding the release of information that might identify them.

As well, if the Motion is granted, Ontario asks that, before releasing the police records to the Commission, it be allowed to redact the records to remove personal health information, any other identifying information, and any privileged communications.

VI. Analysis

The issues raised on this Motion can be addressed by answering the following four questions:

1. Do I have the power to grant the relief requested on the Motion?
2. Is the information requested on the Motion relevant?
3. What approach should I use in deciding the Motion?
4. Using that approach, how ought the Motion to be decided?

1. Power to grant the requested relief

OARC submits that I have the power to grant the relief sought on the Motion, even at this point in the Inquiry process. There was no serious contest on this point. In light of sections 8 and 10 of the PIA 2009 and paragraph 9 of the OIC, I accept OARC's submission. I point particularly to section 10(1)(b), which provides that a commission may serve a summons requiring a person to produce for the public inquiry any information, document or thing under the person's power or control.

2. Relevance of the requested information

For the purposes of this Motion, I accept that the information OARC seeks to obtain is relevant, albeit not directly connected to the Inquiry's mandate.

The Inquiry's mandate is tied to the Offences. The Offences are defined in the OIC as the eight counts of first degree murder, four counts of attempted murder, and two counts of

aggravated assault to which Wettlaufer pled guilty and was convicted on June 1, 2017. Paragraph 2 of the OIC sets out the Commission's mandate, directing it to inquire into the Offences and surrounding circumstances which allowed the Offences to occur.

The requested information relates to police investigations, not to the Offences within the meaning of the OIC. However, the police investigations were into acts allegedly committed by Wettlaufer against residents in LTC homes and at least one of the alleged acts of wrongdoing is proximate in time and location to one of the Offences. When determining relevancy for the purposes of this Motion, I would not construe it so narrowly as to exclude the requested information.

3. The Approach to be used in Deciding the Motion

a. A Preliminary Matter

As a preliminary matter, I will address OARC's suggestion that I should follow the approach taken in the Elliot Lake Public Inquiry to late-disclosed material. Because the relevant facts in the Elliot Lake Public Inquiry are so different from those in this case, I do not find its approach to be of assistance in deciding this Motion.

The Elliot Lake Public Inquiry was established following the collapse of a portion of the rooftop parking deck of the Algo Centre Mall in Elliot Lake. The collapse sent tons of concrete, mangled steel, drywall, glass, and one vehicle crashing down, killing two people and injuring nineteen others.

On May 8, 2014, more than nine months after hearing closing submissions in its public hearings, the Commission received an anonymous letter along with a 1988 report, in both English and French, entitled *Deterioration of parking structures* (the **1988 Report**). The 1988 Report had not been produced during the Commission's investigations despite the fact that, as Commissioner Bélanger found, "many participants in the Inquiry had been

involved in its preparation almost three decades before". (Page 30 of the Report of the Elliot Lake Commission of Inquiry, Executive Summary) (the **Executive Summary**).

The 1988 Report is described at page 28 of the Executive Summary as follows:

> The Advisory Committee on the Deterioration, Repair and Maintenance of Parking Garages was formed in November 1986 by the former Ministry of Housing. Leading Ontario specialists were asked to address the deterioration of the existing provincial stock of approximately 3,000 parking structures – chloride-induced damage estimated to be worth about $1 billion at that time. The goal was to provide a comprehensive repair and restoration program by 1992 which was "affordable, effective and enforceable".

Commissioner Bélanger issued a Procedural Order seeking confirmation of the 1988 Report's authenticity and information about government actions taken in response to it. The Ontario government and four other participants provided submissions. In its submission, the Ontario government confirmed the authenticity of the 1988 Report. It also outlined the steps it had taken, following the Report's publication, to amend the regulations for the design and construction of new buildings, disseminate the amendments, and participate in research studies and projects.

At page 30 of the Executive Summary, Commissioner Bélanger states that the 1988 Report discusses issues that "go to the very heart of the Algo Mall's existence and tragic demise" and said that early knowledge of the content of the 1988 Report would have affected the Commission's approach to its mandate.

The requested information on this Motion is very different from that in the 1988 Report. The 1988 Report had been in the public domain for over 25 years when it was produced to the Commission. It was the work of "leading Ontario specialists" and its authenticity was easily and readily verified. Further, the validity of the contents of the 1988 Report was not disputed – it led to amendments being made to the regulations governing the

design and construction of new buildings in Ontario. Moreover, the information in the 1988 Report went to the issues “at the very heart” of the Elliot Lake Public Inquiry.

Unlike the information in the 1988 Report, which was in Commissioner Bélanger’s hands, the requested information is not in my hands and it would not be a quick process to obtain it. As Ontario’s submission makes plain, before the requested documents could be released to the Commission, they would have to be reviewed and redactions made, a process that in this Inquiry has typically taken months. Moreover, as I explain above, the requested information is not directly relevant to the core Inquiry mandate. Further, the requested information on the Motion is untested and no charges have been laid arising from it. Unlike the information in the 1988 Report, I could not accept the requested information at face value. I could not rely on it for fact finding purposes or the making of recommendations without following a process that would both test its validity and meet procedural fairness considerations.

b. Section 5 of the PIA 2009

This Inquiry was established pursuant to the PIA 2009 and the OIC. Paragraph 2 of the OIC sets out the Commission’s mandate; it begins with these words, “Having regard to section 5 of the *Public Inquiries Act, 2009”*. In my view, the provisions in section 5 of the PIA 2009 apply to all aspects of the conduct of this Inquiry, including this Motion.

Section 5 reads as follows:

> **5.** A commission shall,
>
> a) conduct its public inquiry faithfully, honestly and impartially in accordance with its terms of reference;
> b) ensure that its public inquiry is conducted effectively, expeditiously, and in accordance with the principle of proportionality; and
> c) ensure that it is financially responsible and operates within its budget.

Of the provisions in section 5, those in section 5(b) are the most relevant for the purpose of deciding the Motion. Therefore, the approach to be taken in deciding the Motion is to consider what effect granting the Motion would have on my duty to ensure that the Inquiry is conducted "effectively, expeditiously, and in accordance with the principle of proportionality".

4. Deciding the Motion

Below I consider the effects of granting the Motion on each of the three components in section 5. While there are considerations cutting both ways in respect of my duty to ensure that the Inquiry is conducted effectively, granting the Motion would clearly be contrary to my obligations to conduct the Inquiry expeditiously and in accordance with the principle of proportionality. Accordingly, I would dismiss the Motion.

Effectively

The word "effectively" in section of 5(b) of the PIA 2009 is not defined. For the purpose of the Motion, in my opinion, it would encompass public interest considerations such as those raised in the Parties' submissions. Those considerations cut both ways.

OARC and ONA point to the public interest in demonstrating, to the public, that the Inquiry did not overlook, conceal, or ignore any harm alleged to have been perpetrated by Wettlaufer. Further, there is strength in their contention that for there to be public confidence in the work of the Inquiry, the requested police records must be obtained and placed in the public domain.

Commission counsel, on the other hand, contend that the public interest is best served by dismissing the Motion because granting it will interfere with the Report's timely release, for which there is already an ample evidentiary foundation. They say that the timely release of the Report, with its recommendations aimed at preventing a re-occurrence of

similar tragedies, is one of the Inquiry's core social functions and urgently needed to address the systemic failings that allowed Wettlaufer to commit the Offences.

Expeditiously

Granting the Motion would not be expeditious: it would delay the release of the final Report by many months. A consideration of the following two factors show why.

First, for the reasons given by Ontario in its submission, before the requested police records could be delivered to the Commission, Ontario would have to review them and make the necessary redactions to protect personal health information and confidential personal information. As well, Ontario would have to be given sufficient time to review the records to determine whether they contain privileged communications. Further, because disclosure of the police records would *prima facie* have an impact on the anonymity of the unidentified resident and his or her family, fairness considerations dictate that they be given notice of any proposed disclosure of those records, along with the opportunity to make submissions regarding the release of information that might identify them.

Second, the New Statement contains unproven allegations on which no new charges were laid. Consequently, for the information contained in the police records to be of value to the Inquiry, the validity of that information would have to be determined. A jurisdictional hurdle may preclude me from making factual findings necessary for that determination. Paragraph 3 of the OIC provides that I am to perform my duties "without expressing any conclusion ... regarding the **potential** civil or criminal liability of any person" (emphasis added).

Assuming that the Inquiry is an appropriate and available venue for determining the validity of the information, procedural fairness would require that the information be subjected to the same type of process as that used for the evidence gathered during the investigative phase of the Commission's work – meaning more document searches, more

interviews and re-interviews of witnesses, and providing the Participants with the opportunity to raise concerns about the new information. In effect, it would require that I re-open the Public Hearings.

Proportionality

The PIA 2009 gives no definition for the term “the principle of proportionality” used in section 5. For the purpose of the Motion, in my view, the proportionality principle requires me to weigh the benefit to the Inquiry from receiving the police records against the costs that would ensue as a result of receiving them.

In terms of benefit, apart from the arguable value to the public interest discussed above, there is none. The records contain the results of the police investigations, from which no new charges arose. The information in the records is untested by any legal proceeding and I cannot use them to make findings of fact or as the basis for recommendations.

In terms of costs, I have already explained the delay that would occur before the records could be produced to the Inquiry because of obligations to, among other things, protect personal health information and confidential personal information. I have also described the delays that would be involved in establishing the validity of the information in the police records (even presupposing that the Inquiry could meet the jurisdictional hurdle to engaging in that process). Thus, receipt of the police records would also threaten the integrity of the Inquiry process.

In addition, there is a human cost to delaying the completion of the Inquiry for those Participants and witnesses who have found the Inquiry process stressful and emotional. There is also a very real cost to the public in delaying release of the final Report, given that its findings and recommendations carry the prospect of change to the LTC system. All of these costs must be considered in light of the existing solid evidentiary record which

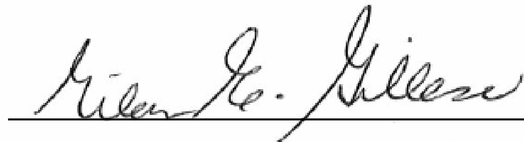
shows how Wettlaufer carried out the Offences and how systemic factors may have allowed them to have been committed.

When I consider the limited, and speculative, benefit to the public interest in receiving the requested police records against the known costs associated with that course of action, section 5 compels me to dismiss the Motion.

VII. Disposition

For these reasons, the Motion is dismissed.

Dated: March 19, 2019



The Honourable Eileen E. Gillese
Commissioner