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

The Honourable Eileen E. Gillese
Commissioner

Ontario

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 PROCEDURAL MOTION respecting Elizabeth Wettlaufer

APPEARANCE LIST

(as a group) Arpad Horvath Jr., Laura Jackson, Don Martin, Andrea Silcox, and Adam Silcox-Vanwyk, represented by Alex Van Kralingen, Katherine Chau and Mark Repath

The Commission, represented by Mark Zigler, Liz Hewitt, Rebecca Jones, Megan Stephens, Lara Kinkartz, and Lindsay Merrifield

AdvantAge Ontario – Advancing Senior Care, represented by Jared B. Schwartz

Caressant Care Nursing and Retirement Homes Limited, Caressant Care – Woodstock, represented by David M. Golden

College of Nurses of Ontario, represented by Denise Cooney and Megan Schwartzentruber

Her Majesty the Queen in right of Ontario, represented by Darrell Kloeze and Judith Parker

Interfaith Social Assistance Reform Coalition, represented by Rabbi Schachter

Jarlette Health Services and Meadow Park (London) Inc. o/a Meadow Park London Long-Term Care, represented by Lisa Corrente

Ontario Association of Residents' Councils, represented by Suzan Fraser and Jane Meadus

Ontario Long Term Care Association, represented by Melanie Ouanounou

Ontario Nurses' Association, represented by Kate Hughes

Heard: May 23, 2018
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Commissioner Gillese:

Arpad Horvath Jr., Laura Jackson, Don Martin, Andrea Silcox, and Adam Silcox-Vanwyk bring a procedural motion relating to the Inquiry's Public Hearings. These individuals are family members and loved ones of three of Elizabeth Wettlaufer's victims. As a group, they were given a single grant of participation in the Public Hearings. Because there is a single grant of participation, for ease of reference I will refer to these individuals collectively as the "**Moving Participant**".

In the motion, the Moving Participant asks that I direct Commission counsel to compel Elizabeth Wettlaufer's attendance to testify at the Public Hearings.

I. Background in Brief

Effective August 1, 2017, this Commission was established under the *Public Inquiries Act, 2009*, S.O. 2009, c. 33 (the "**Act**"), by Order in Council 1549/2017 (the "**OIC**"). Broadly speaking, its mandate is to identify and make recommendations to address systemic failings in Ontario's long-term care homes system that may have occurred in connection with the offences that Wettlaufer committed while working as a registered nurse in that system.

The Commission has scheduled Public Hearings to begin on June 5, 2018.

On January 18, 2018, I ruled on who had the right to participate in the Public Hearings (the "**Participants**").

Rules of Procedure for the Public Hearings were published on March 15, 2018. Rules 44-48 of the Rules of Procedure set out a process enabling Participants to bring procedural motions to resolve procedural issues related to the Public Hearings that have not been otherwise been settled with Commission counsel.

This motion is brought pursuant to Rules 44-48 of the Commission's Rules of Procedure.

II. The Moving Participant's Position on the Motion

The Moving Participant argues that the following factors militate in favour of compelling Wettlaufer to testify at the Public Hearings:

a. She has shown an interest in being a productive part of the Inquiry and appears to be open to discussing the circumstances surrounding her offences;
b. There would be much to learn from her cross-examination by the Participants;
c. Wettlaufer's direct participation at the Public Hearings aligns with the Commission's articulated guiding principles of thoroughness, transparency and fairness, and would not detract from its other guiding principle of timeliness;
d. The documents that Commission counsel will introduce at the Public Hearings relating to Wettlaufer provide insufficient detail on a number of issues on which the Inquiry is required to opine;
e. Any disruption to the proceedings or sensationalism associated with Wettlaufer's proposed attendance comes from the nature of the offences themselves and not her attendance. Furthermore, the Inquiry has taken steps to ensure that coverage of the Public Hearings is done in a dignified manner;
f. In the past, public inquiries in Ontario and elsewhere have called - or at least attempted to call – wrongdoers to testify at their Public Hearings;
g. There is much that can be learned from hearing further from Wettlaufer, including on such matters as: staffing levels at the facilities and how they might have contributed to her offences; the location of where she worked in the facilities relative to others and how this assisted with her criminal intent; her interactions with the Coroner, hospitals, management and other staff members; the steps she took to conceal her offences; her substance abuse

issues and her interactions with healthcare practitioners in 2006 about her addiction challenges; and

h. Wettlaufer's testimony would enhance that of Prof. Crofts Yorker who is expected to give expert testimony in the Public Hearings.

III. Other Participants' Positions on the Motion

1. Those who support the Motion

Two Participants support the Moving Participant on the motion.

The first such Participant is the group of victims' family members consisting of Susan Horvath, Judy Millard, Stanley Millard, Sandra Millard, Shannon Emmerton, and Jeffrey Millard. This Participant explains its support for the motion as follows. Because Wettlaufer pleaded guilty to the criminal charges and no trial was conducted, her testimony was never tested through cross-examination. This Participant says it is necessary to bring Wettlaufer to testify at the Public Hearings so that the evidence in the criminal proceedings can be "fully examined for its validity and truthfulness".

The other Participant who supports the motion is the Ontario Association of Residents' Councils ("OARC"). OARC's support is based on public interest considerations. These considerations include the need for transparency in public inquiries and the need for the public to see that the Inquiry has conducted a thorough investigation. OARC says that even if oral testimony by Wettlaufer at the Public Hearings were to add nothing of evidentiary value, it would further these twin public policy interests.

2. Those who take no position on the Motion

Jon Matheson, Pat Houde, and Beverly Bertram, a group consisting of a victim and loved ones of a victim, also hold a single grant of participation. This Participant takes no position on the motion explaining that they do not wish to deny other victims and family members

their right to pursue the course of action that they believe best represents their individual interests. Having said that, this Participant also expressly recognizes the validity of Commission counsel's concern that bringing Wettlaufer to testify at the Public Hearings might be disruptive, including to some victims' families and their loved ones.

Caressant Care Nursing and Retirement Homes Limited, Caressant Care - Woodstock, and Jarlette Health Services and Meadow Park (London) Inc. o/a Meadow Park London Long-Term Care also take no position on the motion. They give the following explanation for their position. These Participants together brought their own procedural motion, one part of which relates to Wettlaufer. In the view of these Participants, that part of their motion relating to Wettlaufer provides a compromise position between that of the Moving Participant and Commission counsel in this motion. More information about these Participants' motion can be found in the ruling on it, issued concurrently with this ruling (the "**Companion Ruling**").

Other Participants who take no position on the motion are:

- College of Nurses of Ontario
- Her Majesty the Queen in right of Ontario
- Interfaith Social Assistance Reform Coalition
- Ontario Long Term Care Association
- Ontario Nurses' Association
- Registered Nurses' Association of Ontario
- Registered Practical Nurses Association of Ontario
- Revera Long Term Care Inc.

3. Those who oppose the Motion

Commission counsel oppose the motion.

Commission counsel began by acknowledging the validity of the Moving Participant's desire to cross-examine the person who killed their loved ones. However, they say that the evidence about Wettlaufer that they have provided to the Participants – and which they will tender at the Public Hearings so that the public also has it – is sufficient to show how she was able to carry out her offences and conceal them. Commission counsel also explained that after conducting an interview with Wettlaufer on February 14, 2018, they concluded that the disruption and sensation that would be caused by her appearance at the Public Hearings would outweigh the value of the limited additional information that might be obtained from her.

Further, Commission counsel rely on s. 5(b) of the Act, which stipulates that a commission shall ensure that its public inquiry is conducted, among other things, in accordance with the principle of proportionality. They stress that this Inquiry was not established to deal with Wettlaufer but, rather, to examine the systemic factors that may have allowed Wettlaufer to commit the offences. Accordingly, they submit that there is more to be gained in terms of understanding how the tragedies occurred by hearing evidence from those who worked with Wettlaufer, from the facilities themselves, and from those responsible for Wettlaufer's oversight. Commission counsel submit that when these considerations are properly weighed, calling Wettlaufer to testify at the Public Hearings offends the principle of proportionality.

Commission counsel also outlined the difficulties that would be involved in bringing Wettlaufer to the Public Hearings in Ontario, given that she is now incarcerated in Quebec.

IV. Analysis

I have carefully considered this matter and concluded against directing Commission counsel to compel Wettlaufer's attendance at the Public Hearings. In my view, whatever evidentiary benefit there might be from her testifying at the Public Hearings is significantly outweighed by the costs associated with her attendance.

In the reasons that follow, I will address the arguments advanced by those in support of the motion. Before doing so, however, it is important to appreciate the context within which I must decide this motion.

1. Contextual Considerations

The following four contextual considerations inform my decision.

a. The scope of the Inquiry

This Inquiry was not established to determine wrongdoing in the sense of finding out who killed and harmed the victims. By the time that this Inquiry was struck those things were known - Wettlaufer had confessed to the offences and, thereafter, been convicted of them and sentenced.

Rather, broadly speaking, this Inquiry was established to inquire into the systemic factors that may have allowed Wettlaufer to commit the offences. As stated in the fourth preamble of the OIC, I was appointed Commissioner "to identify and make recommendations to address systemic failings in Ontario's long-term care homes system that may have occurred in connection with the Offences".

b. The relevant legislative dictates

Section 5 of the Act sets out the duties of the Commission. The relevant part of s. 5 of the Act reads as follows:

> **5**. A commission shall,
>
> …
>
> (b) ensure that its public inquiry is conducted effectively, expeditiously, and in accordance with the principle of proportionality.

Section 9 of the Act also bears on this motion and a proportionality analysis. The relevant provisions of s. 9 read as follows:

> **9.(1)** … a commission shall, as much as practicable and appropriate, refer to and rely on,
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> (a) any public transcript or record of any proceeding before any court or statutory tribunal;
>
> …
>
> (f) any other document or information, if referral to and reliance on the document or information would promote the efficient and expeditious conduct of the public inquiry.
>
> **(2)** A commission may rely on a record or report in lieu of calling of witnesses.

The Inquiry's obligation to rely on existing records, including those from the Wettlaufer criminal proceedings, is reinforced by para. 5 of the OIC, the relevant part of which reads as follows:

> **5.** The Commission shall, as much as practicable and appropriate, refer to and rely on the matters set out in section 9 of the *Public Inquiries Act, 2009*. In particular, the Commission shall review and consider any existing records or reports relevant to its mandate, including the court records of the Wettlaufer criminal proceedings, and other medical, professional and business records. …

c. The evidence that will be introduced at the Public Hearings on Wettlaufer

Commission counsel have already provided the Participants with significant documentary evidence about Wettlaufer and the offences she committed. They intend to tender this evidence at the outset of the Public Hearings. Once admitted into evidence, the documents will be made available to the public at large.

The document that Commission counsel will tender into evidence is the 57-page Agreed Statement of Facts filed jointly by the Crown and defence at the guilty plea proceedings. Wettlaufer's lawyer signed this document, acknowledging its truth. So, too, did Elizabeth Wettlaufer herself. Among other things, the Agreed Statement of Fact sets out the fourteen victims and describes how Wettlaufer killed or harmed them.

Appendices A, C and D are attached to the Agreed Statement of Facts. Appendix A is Wettlaufer's handwritten confession in which she sets out details of the offences, how she committed them and what she was feeling at the time. Appendix B is a video of her police statements and is not included. However, Appendix C (which is included) is the 117-page transcript of those police statements. Appendix D is the Centre for Addiction and Mental Health Discharge Data report on Wettlaufer. It, too, is included.

d. The Public Hearings Schedule

The Public Hearings will provide the factual foundation for the Inquiry's recommendations. In order to serve this vital function, the Public Hearings must be finished sufficiently early in the Inquiry process that the results of those hearings can be used to develop recommendations and still allow the Inquiry to meet its deadline of July 31, 2019, for delivery of the Inquiry Report.

With this in mind, I allotted 10 weeks for the Public Hearings: the month of June (4 weeks), and 2 weeks in each of July, August, and September 2018. In those 10 weeks, four things must be achieved:

i. Commission counsel must present the results of their investigations into the roles played by: the facilities and home care agencies; the office of the Chief Coroner and Chief Forensic Pathologist; the College of Nurses of Ontario; and the Ministry of Health and Long-Term Care and regulated home care services;

ii. the 17 Participants (who have been assigned into groups) must complete, within the times allotted, cross-examination of Commission witnesses and examination-in-chief of their own witnesses;
iii. expert and technical evidence must be led on some of the broader policy issues unearthed through the Commission investigations; and
iv. the Participants must make their closing submissions.

In light of the time constraints, if Wettlaufer is compelled to appear and testify, it is highly likely that other evidence to be called at the Public Hearings would have to be curtailed.

2. A Consideration of the Arguments in Support of the Motion

I turn now to consider the arguments advanced in support of the motion. I will begin by addressing the arguments of the two Participants who support the motion and then turn to those advanced by the Moving Participant.

a. The Submissions of Participants other than the Moving Participant

In addition to the Moving Participant, two participants support the motion. I will deal with each of those participants' submissions, in turn.

It will be recalled that the first Participant who supported the motion did so based on this premise: Wettlaufer should be brought to testify at the Public Hearings so that the evidence in the criminal proceedings could be "fully examined for its validity and truthfulness".

This premise runs afoul of the collateral attack doctrine with the result that I do not accept it.

The collateral attack doctrine can be understood in this way. The documentary evidence about Wettlaufer comes from the criminal proceedings. The Crown, defence counsel and

Wettlaufer herself all consented to it and jointly asked the court that it be admitted into evidence. The court admitted the evidence and registered convictions based on it. The court also relied on that evidence to determine a fit sentence for Wettlaufer. The Public Hearings are not the venue through which the validity and truthfulness of the documentary evidence in question can be challenged. That kind of attack can be launched only in appropriate appeal proceedings against the convictions and/or sentence.

OARC was the other Participant who supported the motion. It will be recalled that OARC's support for the motion was based on public interest considerations, including the need for transparency and to demonstrate the thoroughness of Commission counsel's investigations.

I fully accept that public interest considerations must guide and inform my decision on this motion. However, I do not accept that transparency and thoroughness considerations dictate that Wettlaufer must be required to attend the Public Hearings and testify.

Transparency is the reason for my decision in the Companion Ruling. Commission counsel interviewed Wettlaufer in February of this year. That interview was transcribed and, as a result of the Companion Ruling, that transcript will be made available publicly. The Companion Ruling promotes transparency – the public will be able to see for themselves what questions were put to Wettlaufer by Commission counsel and what her replies are.

However, transparency does not demand that Wettlaufer be called to testify at the Public Hearings absent reasonable grounds to believe that her testimony would be of value. After reading the court records of the Wettlaufer criminal proceedings and the transcript of the later Wettlaufer interview by Commission counsel, in my view, there is little that would be gained from further questioning of Wettlaufer. Therefore, I do not have reasonable grounds to believe that Wettlaufer's testimony at the Public Hearings would be of evidentiary value beyond that provided by documents and records which will already be in evidence at the Public Hearings.

I would conclude on this point by observing that both s. 9 of the Act and para. 5 of the OIC are clear and explicit: the Commission is to rely on court records in lieu of calling witnesses as much as practicable and appropriate. In these circumstances, in my view, it is practicable and appropriate to rely on the court records of the Wettlaufer criminal proceedings, supplemented by the transcript of the later Wettlaufer interview by Commission counsel.

As for thoroughness, that must be measured in relation to two things: the scope of the Inquiry and the principle of proportionality. Both augur against calling Wettlaufer to testify.

In terms of the scope of the Inquiry, it must be remembered that the Inquiry was not established to deal with Wettlaufer. The criminal justice system has already performed that function with the result that she is now serving a life sentence in prison. The Inquiry was established to examine the systemic factors that may have allowed the offences to be committed. The existing documentary evidence on Wettlaufer tells us how she carried out the offences and how she concealed them. A consideration of the Inquiry's scope augurs in favour of time being spent at the Public Hearings on the evidence relating to the systemic factors that may have allowed the offences to be committed, not on Wettlaufer's views of those systemic factors.

As we have seen, s. 5 of the Act compels the commission to ensure that its public inquiry is conducted in accordance with the principle of proportionality. Proportionality necessarily entails a consideration of the costs and benefits of compelling Wettlaufer to attend and testify. As I have already explained, I see little evidentiary value in having Wettlaufer testify at the Public Hearings. On the other hand, I see very real costs associated with her attendance, including lost hearing time on the systemic factors that may have allowed the offences to be committed.

Section 9 of the Act is also relevant to the question of proportionality. It will be recalled that s. 9(1) of the Act requires the commission to (among other things) refer to and rely on, "as much as practicable and appropriate", public transcripts or records of court

proceedings, and any other documents or information, if referral to and reliance on the document or information would promote the efficient and expeditious conduct of the public inquiry. Section 9(2) expressly empowers the commission to rely on a record or report in lieu of calling witnesses. In short, s. 9 of the Act supports reliance on the existing documentary evidence rather than compelling Wettlaufer to testify at the Public Hearings.

In conclusion, while the public interest lies in favour of transparency and thoroughness in Inquiry proceedings, when those matters are being considered in the context of testimony to be compelled at the Public Hearings, they must be informed by the legislative dictates. When that is done, in my view it is clear that compelling Wettlaufer's attendance and testimony at the Public Hearings offends the principle of proportionality.

b. The Moving Participant's Submissions

The Moving Participant gave eight reasons for why Wettlaufer should be compelled to testify at the Public Hearings. For the convenience of those reading this ruling, I set out those eight reasons again here. After setting out each one, I will offer my response for why it does not warrant compelling Wettlaufer to attend at the Public Hearings.

a. She has shown an interest in being a productive part of the Inquiry and appears to be open to discussing the circumstances surrounding her offences.

Analysis: This may be but, for the reasons already given, when considered within the scope of the Inquiry as established by the OIC, there are no reasonable grounds for believing that her testimony would be of evidentiary value beyond that provided by the court records that will already be in evidence at the Public Hearings.

b. There would be much to learn from her cross-examination by the Participants.

Analysis: As I have explained above, the record does not support this.

c. Wettlaufer's direct participation at the Public Hearings aligns with the Commission's articulated guiding principles of thoroughness, transparency and fairness, and would not detract from its other guiding principle of timeliness.

Analysis: Again, as I explain above, these general principles must be considered within the specific context of the Public Hearings and measured against the proportionality principle mandated by the Act. I will not repeat my explanation, above, for why compelling Wettlaufer to attend and testify at the Public Hearings offends the proportionality principle. I would, however, add that it is very likely that if compelled to attend and testify, it would detract from the timeliness principle. In this regard, I harken back to the contextual considerations set out above in respect of the Public Hearings Schedule.

d. The documents Commission counsel will introduce at the Public Hearings relating to Wettlaufer provide insufficient detail on a number of issues on which the Inquiry is required to opine.

Analysis: Wettlaufer can offer little, if anything, of value on the systemic issues, which is the Inquiry's mandated focus. On the other hand, the evidence that Commission counsel has indicated it will lead on the systemic issues appears to be directly relevant to the systemic issues.

e. Any disruption to the proceedings or sensationalism associated with Wettlaufer's proposed attendance comes from the nature of offences themselves and not her attendance. Furthermore, the Inquiry has taken steps to ensure that coverage of the Public Hearings is done in a dignified manner.

Analysis: I will assume, for the purposes of this motion, that the Moving Participant is correct when it says that Wettlaufer's attendance at the Public Hearings would not be a source of disruption and sensationalism. However, as I explain above, a full consideration of the costs and benefits associated with her proposed attendance leads me to conclude that she should not be so

compelled. And, I would note, that consideration did not include the possibility of disruption and sensationalism.

f. In the past, public inquiries in Ontario and elsewhere have called - or at least attempted to call – wrongdoers to testify at their Public Hearings.

Analysis: This Inquiry is in a very different position than any other to date. In other public inquiries, alleged wrongdoers were called to testify in order for the Commissioner to make findings about what happened, when and how. To the best of my understanding, no past public inquiry has had the benefit of an undisputed court record that included such information.

In this Inquiry, there is no question who the wrongdoer is. Nor is there any dispute about how the offences were committed and what steps Wettlaufer took to avoid detection. The Agreed Statement of Facts from the criminal justice proceedings includes undisputed evidence on these matters. Wettlaufer's detailed confession, in conjunction with the Agreed Statement of Facts, offers unparalleled direct, uncontroverted evidence about her wrongdoing. All of the court records and other documentary information will be entered at the Public Hearings and, once entered into evidence, be made available to the public.

As well, other public inquiries may not have been subject to the directives of s. 9 of the Act. It will be recalled that s. 9(1) requires the Inquiry to refer to and rely on court records and transcripts, as much as practicable and appropriate. Section 9 (2) also exhorts the Inquiry to rely on records and reports in lieu of calling witnesses. Furthermore, para. 5 of the OIC repeats those directives.

g. There is much that can be learned from hearing further from Wettlaufer, including such things as: staffing levels at the facilities and how that might have contributed to her offences; the location of where she worked in the facilities relative to others and how this assisted with her criminal intent; her interactions with the Coroner, hospitals, management and other staff

members; the steps she took to conceal her offences; her substance abuse issues and her interactions with healthcare practitioners in 2006 about her addiction challenges.

Analysis: As I explain above, in my view there is little value in Wettlaufer's evidence on these matters. On the other hand, however, there is much to be gained from hearing from the relevant stakeholders on such matters.

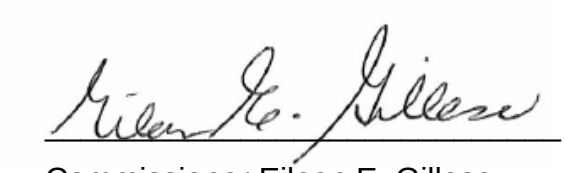
h. Wettlaufer's testimony would enhance that of Prof. Crofts Yorker who is expected to give expert testimony in the Public Hearings.

Analysis: At this point, I have not seen Prof. Crofts Yorker's expert report nor, to the best of my understanding, have the Participants. In its absence, I must confess that I do not understand how Wettlaufer's testimony could enhance Prof. Crofts Yorker's expert testimony on the phenomenon of health care serial killing.

V. Conclusion

It is for these reasons that I have concluded that whatever evidentiary benefit there might be from Wettlaufer's testimony at the Public Hearings is significantly outweighed by the costs associated with that attendance. Accordingly, I dismiss the motion.

Dated: May 29, 2018



Commissioner Eileen E. Gillese