

# ONTARIO COURT OF JUSTICE

DATE: 2018 10 01  
COURT FILE No.: Ottawa 17-30505, 17-30544

**B E T W E E N :**

**HER MAJESTY THE QUEEN**

**— AND —**

**ELISSA AUBREY-LAFRENIERE & NORA AUBREY-LAFRENIERE**

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Before Justice Ann M. Alder  
Ruling on Mohan Voir Dire released on October 1<sup>st</sup>, 2018

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**Ms. T. Dobec ..... counsels for the Crown**  
**Mr. J. Nadler ..... for Elissa Aubrey-Lafreniere**  
**Mr. P.-L. Frechette ..... for Nora Aubrey-Lafreniere**

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**ALDER J.:**

[1] Following a *voir dire* on whether Dr. Johnson, a Crown witness should be qualified as an expert and permitted to give opinion evidence in regards to the “veterinarian medicine” this Court permitted Dr. Johnson to give opinion evidence and stated reasons would follow. These are the reasons.

[2] *R. v. Mohan* (1994) 2 SCR sets out a two part test by which to determine whether expert evidence is or is not admissible.

[3] The first phase or part of the test requires the proponent of the expert evidence to satisfy the threshold requirement of the following four criteria.

- Relevance

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- Necessity in assisting the trier of fact
  - Absence of any exclusionary rule
  - A properly qualified expert.

[4] The second phase, referred to as the gate keeper stage, requires the trial judge to exercise discretion by balancing any potential risks and benefits of admitting evidence.

[5] The Supreme Court of Canada in *White Burgess Langille Inman v. Abbots and Haliburton Co.* held that whether an expert is able or willing to fulfill his or her duty of independence and impartiality is a question that falls within the ambit of being a properly qualified expert.

[6] At the first threshold stage of the Mohan Test, the party opposing the admission of the evidence has the burden of showing there is a realistic concern as to the expert's independence or impartiality. If they do, the burden shifts to the party calling the expert evidence to establish the expert's independence and impartiality on a balance of probabilities.

[7] The Court went on to say that the inquiry into bias does not end with a finding that the expert evidence meets the threshold criteria. Concerns with issues of bias, independence and impartiality must also be taken into account at the weighing/balancing – gatekeeper stage.

[8] It is only the issue of independence and impartiality that is at issue here. Defence counsel argues that at both stages of the Mohan test, the witness's bias or apparent bias, lack of independence and impartiality is such that he should not be permitted to testify as an expert and provide expert evidence.

[9] As noted, there is no issue with Dr. Johnson, in regard to the other Mohan criteria. It is also admitted that he possesses the qualifications to form an opinion, his CV was admitted.

[10] The argument is founded on two facts: the first that Dr. Johnson called or directed someone to call the OSPCA to report the accused. He testified he did so because he had a legal duty to do pursuant to s.11.3 of the Ontario Society for the Prevention of Cruelty to Animals Act.

[11] Section 11.3 reads:

“Every veterinarian who has reasonable grounds to believe that an animal has been or is being abused or neglected shall report his or her belief to an inspector or an agent of the society”

[12] Secondly, Defence relied more on the fact that Dr. Johnson testified he was aware that staff at the veterinarian clinic(s) he worked at believed the accused should not have animals and he was also aware of negative comments being made about the accused.

[13] Dr. Johnson said none of these comments affected his opinion or his decision to report to the OSPCA.

[14] I accept his evidence on that point, there is no other evidence on this point.

[15] The fact that the circumstances may and I emphasize may give some appearance of bias is not relevant at the threshold phase of the Mohan test.

[16] In *WBLI v. Abbott and Haliburton*, the Court said “it is not whether a reasonable observer would think that the expert is not independent”.

[17] A review of some Court of Appeal cases confirms this. In *R. v. Rogers* (2015), ONCA, 399, the forensic pathologist called by the Crown, admitted telling the Crown she hoped the accused would be convicted. This comment would give the appearance of bias, however it was still admissible. In *R. v. Natsis* (2018), ONCA, 425, the Court of Appeal confirmed the trial judges' ruling to admit an expert's evidence even though, he had concluded there was "a realistic " concern, the witness was biased but believed he could still provide impartial evidence on some points.

[18] I am satisfied Dr. Johnson meets the threshold criteria and is a properly qualified expert.

[19] There remains the second phase, the gate keeper stage: At this stage, as the OCA in *Natsis* said "bias is to be taken into account in the overall weighing of the costs and benefits of receiving the evidence, context is important."

[20] Much of Dr. Johnson's evidence is admissible without the necessity of being qualified as an expert.

[21] Specifically, his observations when he examined the dog and his interactions with the accused. His expert evidence is in relation to narrow issues and he is not the only expert in veterinarian medicine to testify. I am satisfied that any arguments that is opinions may have been influenced subconsciously can be argued in regard to weight but are not of such concern that his evidence should not be admitted.

Released: October 15<sup>th</sup>, 2018

  
Signed: Justice Ann M. Alder