



Report 1: Mihaly Case Study

ENGG513

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1. Introduction

This report summarizes the case of the *Association of Professional Engineers and Geoscientists in Alberta* (APEGA) v Mihaly and provides a detailed reflection on the related decisions. The case was presented to determine whether APEGA discriminated against Mr. Mihaly on the grounds of his place of origin during his attempts to register as a professional engineer with the organization. Furthermore, if found that it is so, it is to decide if Mr. Mihaly has experienced financial damages due to loss of income and whether he should be exempt from confirmatory exams.

Mr. Mihaly has been seeking to join APEGA since 1999 and has been unsuccessful on three separate occasions. In 2014 Mihaly brought up a case against APEGA to the Alberta Human Rights Commission. The tribunal ruled in Mihaly's favor, a ruling which APEGA appealed with the Court of Queen's Bench in February 2014. In 2016, the Court of Queen's Bench reversed the ruling and APEGA was found to not be guilty of discrimination on grounds of place of origin. The report will describe the reasoning behind these two different decisions as well as provide my personal reflection on the rulings.

2. Stakeholders

There are at least 7 identifiable stakeholders in this case:

APEGA – the *Association of Professional Engineers and Geoscientists in Alberta*. They are responsible for regulating the practices of engineering and geoscience in Alberta on behalf of the Government of Alberta. “Our main regulatory function is licensing individuals and companies that want to practice engineering and geoscience in Alberta. Applicants and companies that meet APEGA's standards for ethical, professional, and technical competency earn the right to practise and use reserved titles and designations.” (APEGA, n.d.). The Association is a stakeholder in this case, because its results directly impact its regulatory function.

Mr. Ladislav Mihaly – Mr. Mihaly is a Canadian immigrant from the former Czechoslovakia. He was trained as an engineer, receiving a master's degree from Slovak Technical University in Bratislava (UBS) in 1975 and further certification from the Institute of Chemical Technology (ICT) in Prague in 1981. After several unsuccessful attempts to register with APEGA, Mr. Mihaly filed a complaint with the Alberta Human Rights Commission. As a resolution of the case, he hopes to become allowed to join APEGA without writing the assigned confirmatory exams and hopes to receive a financial award to cover his perceived loss of wages during the period of unsuccessful attempts to become registered with APEGA.

The Court of Queen's Bench – As summarized by the Alberta Courts website, “Court of Queen's Bench is the Superior Trial Court for the Province, hearing trials in civil and criminal matters and appeals from decisions of the Provincial Court.” (Courts, n.d.). In this case they are designated to resolve the appeals case. It is in their best interest to rule a fair outcome for this case, as future cases might refer to this case as evidence.

The Alberta Human Rights Commission (AHRC) – A commission established by the Alberta government through the *Alberta Human Rights Act* (AHRA). As explained on their website,

“The Commission has a two-fold mandate: to foster equality and to reduce discrimination. It fulfills this mandate through public education and community initiatives, through the resolution and settlement of complaints of discrimination, and through human rights tribunal and court hearings.” (Alberta Human Rights Commission, 2012) In this particular case, the mentioned human rights tribunal has ruled in Mr. Mihaly’s favor. If the ruling is not reversed at the Court of Queen’s Bench, this case decides what constitutes discrimination under the AHRA.

The General Public in Alberta – The purpose of APEGA is to serve the public and to make sure only engineers that have met the standards for “ethical, professional and technical competency” have the right to practice in Alberta. “The public knows a licensed engineer or geoscientist has a certain level of knowledge and skills and can practice independently and will not put them at jeopardy when they make decisions,” (Cotter, 2016), said Mark Flint, the CEO of APEGA. If the case was decided in Mr. Mihaly’s favor, this opens the possibility of engineers who do not meet these requirements to be able to practice. This could lead to public health and safety concerns.

Other Foreign Trained Engineers – The decision of this case sets a precedent for future Foreign Trained Engineers wishing to register with APEGA. If APEGA is no longer able to assign confirmatory exams to engineers with foreign training, this allows more of the foreign trained engineers to register and potentially earn higher paying jobs and recognition of their experience. These engineers stand to benefit from the decision of the court.

The Alberta Government – The Alberta government is responsible both for the *Alberta Human Rights Act* which allows for such cases to be brought to court, as well as the *Engineering and Geoscience Professions Act* that brought APEGA into existence as an association to regulate the practice of engineering on their behalf. The outcome of this case has an impact on the future jurisdiction of each of the organizations, likely adding some amendments to each or either act.

3. Background

This case has a lengthy background history prior to being brought to the Court of Queen’s Bench in July 2015. To understand this case, it is necessary to understand the history of Mr. Mihaly and his several attempts to register with APEGA, as well as the laws and policies within which agencies like the Alberta Human Rights commission and APEGA operate in. The case began with Mr. Ladislav Mihaly’s first application with APEGA in 1999 following his immigration to Canada. and ended with APEGA applying for an appeal following the Alberta Human Rights tribunal ruling in Mr. Mihaly’s favor in November 2014.

Mr. Mihaly was born and educated in the former Czechoslovakia, receiving a M.Sc. Diploma with specialization in Technology of Fuels and Thermal Energy from Slovak Technical University in Bratislava (UBS) in 1975. He then received a Certificate of Corrosion Engineering from Institute of Chemical Technology (ICT) in Prague in 1981.

After immigrating to Canada, Mr. Mihaly applied to be registered as a professional engineer in May 1999. APEGA acknowledged the application, requested transcripts and informed Mr. Mihaly that he was required to write the National Professional Practice Exam (NPPE). The

“[NPPE] confirms knowledge of professionalism, law, and ethics.” (APEGA, n.d.) All applicants are required to pass this exam before they can be licensed to practice in Alberta. Mr. Mihaly failed his first attempt to write this exam on January 17 2000 and APEGA informed him that he had to complete 3 confirmatory exams in addition to the NPPE and pass an equivalent examination in engineering economics. Mr. Mihaly applied to write the NPPE exam for a second time but did not show up on the day of the exam and hence his application was withdrawn.

In 2002, Mr. Mihaly asked to reactivate his application and wrote the NPPE exam again and failed. He then wrote it again in 2003 and failed. His application was withdrawn again because he failed to write the exams in the required timeframe.

In 2006, Mr. Mihaly asked to reactivate his application for the 3rd time. The board added that Mr. Mihaly will need a year of Canadian work experience (D level) to successfully register. Mr. Mihaly did not write any of the required exams in the given period and his application was closed again.

In 2008, Mr. Mihaly filed a complaint with the Alberta Human Rights Commission (AHRC) on the basis that APEGA discriminated against him based on his place of origin when it denied him registration as a professional engineer.

The specific section of the Human Rights Act that was discussed is as follows:

“No trade union, employers’ organization or occupational association shall

- (a) exclude any person from membership in it,
- (b) expel or suspend any member of it, or
- (c) discriminate against any person or member,

because of the race, religious beliefs, colour, gender, gender identity, gender expression, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income, family status or sexual orientation of that person or member.” RSA 2000 cH-14 s9;2009 c26 s8;2015 c18 s3 (Province of Alberta, 2018)

On February 6, 2014, the Tribunal found that “Mr. Mihaly has succeeded in establishing that the Examination Standard and the Experience Standard used by [APEGA] to assess his educational credentials, without more individualized assessment or exploration of other options, constitutes discrimination which cannot be justified under the [AHRA]. The Tribunal Decision, at para 242.” (Ross, 2016). Furthermore, the Tribunal awarded Mr. Mihaly \$10,000 in general damages and ordered APEGA to reconsider Mr. Mihaly’s application.

On November 20, 2014, APEGA filed its appeal brief. After some delays to gather more information, the appeal hearing proceeded on July 23 and 24 2015.

4. The Court of Queen’s Bench Decision

The decision to Appeal the Tribunal’s ruling at the Court of Queen’s Bench came down to four main issues:

1. Procedural Fairness – were the rules of procedural fairness breached by the tribunal?

2. Jurisdictions – did the Tribunal have jurisdiction to determine whether discrimination based on place where a person receives education is same as discrimination based on place of origin?
3. Prima facie discrimination – did the Tribunal use the correct legal test and reasonably apply it to situation?
4. Justification – was the Tribunal’s decision that APEGA’s registration requirements were unjustified unreasonable?

For the first issue of procedural fairness, the Tribunal was found to not be in breach of the related rules. APEGA stated that the interpretation made by the tribunal is incorrect in the following statement: "an applicant may be assigned confirmatory examinations or examinations for the purpose of correcting a perceived academic deficiency." (Ross, 2016) APEGA claims the “or” in the sentence was ignored in the tribunal decision. APEGA further claimed that the “Tribunal breached the duty of fairness by basing his decision on grounds that the parties did not advance, and that they were not given an opportunity to address”. However, the justice decided that this was not the case where APEGA did not have an opportunity to respond. She decided it was not possible to establish a breach of the rules of procedural fairness.

In the second issue of jurisdiction, APEGA was not able to establish that the Tribunal lacked jurisdiction. APEGA claimed that the Tribunal has no jurisdiction over Mr. Mihaly's complaint because AHRA does not protect against discrimination based upon the "place of origin of academic qualifications". They used the *Grover v Alberta* 1997 case as evidence, in which it was decided that "place of education" was not the same as "place of origin". Furthermore, APEGA stated that the Tribunal had no jurisdiction to adjudicate Mr. Mihaly's complaint because the AHRA does not protect against discrimination based upon the "place of origin of academic qualifications". However, the Justice found that the Moore test, which was correctly applied to this case, did not require that "place of origin" be interpreted as including "place of education". Hence, the APEGA was not able to show that the Tribunal lacked jurisdiction.

For the third issue, of *prima facie* discrimination, the Justice found that the Tribunal’s apparent finding of such discrimination was unreasonable. APEGA argued that the Moore test that was used to find prima face discrimination required Mr. Mihaly to demonstrate that he was unable to register because of “arbitrary or stereotypical treatment that is an affront to human dignity.” (Ross, 2016) The Justice then stated: “Arbitrariness and stereotyping are relevant but not required elements in assessing the connection between a ground of discrimination and an adverse impact. The Tribunal did not suggest that arbitrariness or stereotyping were irrelevant; in fact, he found that discriminatory assumptions underlay APEGA's policies regarding internationally educated graduates. The issue is not regarding the selection of the correct legal test, but its application. Thus, the reasonableness standard of review applies.” (Ross, 2016). She went on to conclude that the Tribunal failed to apply the Moore test in relation to the NPPE and Canadian experience requirements, hence she decided that the “Tribunal's apparent finding of prima facie discrimination in relation to the NPPE and the Canadian experience requirement unreasonable”.

For the fourth and final issue of justification, the Justice found the Tribunal’s findings were unreasonable considering the evidence that was presented. This applies to the section 11 of the

AHRA which states "[a] contravention of this Act shall be deemed not to have occurred if the person who is alleged to have contravened the Act shows that the alleged contravention was reasonable and justifiable in the circumstances." The main issue is that the Tribunal found that APEGA did not reasonably accommodate Mr. Mihaly stating that, "that Mr. Mihaly should not have been required to write confirmatory examinations or the FE Exam, but only examinations to correct perceived academic deficiencies following an individualized assessment of his credentials;" But the Justice found that APEGA does not assign examinations based on perceived academic deficiencies, rather, to assess the quality of the undergraduate program undertaken by similar applicants. She also found that the Tribunal's reliance on the aerobic standard in the *Meiorin* case was deeply flawed and unreasonable to apply to the case at hand because the FE exam assigned by APEGA is almost entirely different from aerobic exam. She states that, "The Tribunal's reasons leading to his conclusion that APEGA could have accommodated Mr. Mihaly and others sharing his characteristics are rife with logical errors, findings of fact that are not supported by the evidence, and failures to take into account relevant considerations." Therefore, the justice found the Tribunal's justification unreasonable, and on those grounds, she could conclude that the tribunal's decision be reversed.

5. Reflection and Opinion

The Court of Queen's Bench decision was appealed to the Alberta Court of Appeal. Reflect on the process that has taken place to date: Do you agree with the decisions of the Alberta Human Rights Commission, the Court of Queen's Bench, and the Alberta Court of Appeal? Why or why not?

I agree with the decision of the Court of Queen's Bench to reverse the decision of the Alberta Human Rights Tribunal. As mentioned in the stakeholder's section, if the decision had not been reversed, it would have set a dangerous precedent for future cases. APEGA states that "Serving the public interest is our privilege and our responsibility." (APEGA, n.d.) That is their main priority and not registering as many engineers as possible. While foreign-trained engineers might be set to benefit from the easier requirements to register with APEGA, it would hurt the engineering profession and the general public. I agree with the Justice's findings that the decision made by the Alberta Human Rights Tribunal was unreasonable considering the situation and the evidence.

Should APEGA accommodate foreign-trained engineers and geoscientists? Why or why not? If yes, how should APEGA accommodate foreign-trained engineers and geoscientists?

I also believe that APEGA should make reasonable efforts to accommodate foreign trained engineers and geoscientists, but that should not happen at the expense of jeopardizing public safety or the integrity of the profession. It is important to look at the what the organization already does in terms of accommodating before deciding what else can be done.

The organization does currently take steps to accommodate foreign-trained engineers. Mark Flint, the CEO of APEGA, has said that in 2015, 55% of 9,500 people who applied for licensing with APEGA were from outside of Canada. (Cotter, 2016). APEGA does not publish the statistics of how many of the applicants successfully register after application. However, as

evidence from the court case, it was said that “APEGA receives about 1500 applications each year from internationally educated graduates. About 60 percent are registered with no issues and do not have to write confirmatory examinations or the FE Exam. Twenty-five percent of the applicants are assigned the FE Exam or confirmatory examinations. The remaining 15 percent have sufficient engineering experience to have examinations waived” (Ross, 2016). It is clear from that description that APEGA does make a reasonable effort to individually accommodate the applicants, considering both their experience and the place where they received their education. In addition, they specifically include a designation in their organization allowing for non-Canadian citizens to practice engineering provided they have met all requirements. On their website they define, “Licensee is the designation APEGA gives to an individual who: - has met all academic and experience requirements for licensure in engineering or geoscience, - is not yet a Canadian citizen” (APEGA, n.d.). In addition, they allow for applicants to start applying while living outside of Canada. Such examples show that APEGA makes a reasonable effort to accommodate, without compromising their standards for professional integrity.

It may be possible for APEGA to do more to accommodate foreign-trained engineers. As the Alberta Human Rights Commission has found, APEGA could roll out a program for matching these foreign-trained engineers with practicing professional engineers to provide mentorship and networking opportunities. This would help the immigrants with obtaining the 1 year of Canadian experience (as part of at least 4 years overall experience) that is needed for them to become licensed. Such a program would be relatively inexpensive to implement, when most of the matchmaking process could be implemented over email. Such a program may increase the annual operating costs for APEGA, but in the longer term, it should increase the number of registered members, and therefore increase annual revenue generated from membership dues. Such a program would not increase registrations of engineers who do not meet APEGA’s level standards for ethical, professional, and technical competency, but it would make it easier for engineers to get to a level where they could meet those standards. These statements are of course speculative and not based on any concrete data, as it is difficult to find a study on the benefits and costs of such a program. It is also important to note that such a program falls outside of APEGA’s current responsibilities as outlined in the *Engineering and Geoscience Professions Act*. This includes licensing, setting and enforcement of practice standards, as well as providing its current members with services and support. (APEGA, n.d.). Therefore, it is reasonable to conclude that APEGA already provides sufficient accommodation for foreign-trained engineers, as being more accommodating would involve increasing the scope of its responsibilities.

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