

Mihaly vs. APEGA Case Study

Jiaxin Zhu
ENGG 513
Dr. Denis Onen
February 16, 2018

Introduction

The Mihaly v. APEGA case is a detailed investigation of whether or not APEGA's standards of assessment for registration as a Professional Engineer are unfair for foreign applicants. Mr. Mihaly's registration process with APEGA required an evaluation of the fairness in APEGA's request for him to write exams to confirm his credentials. Mr. Mihaly believed that APEGA discriminated against him in relation to his application to be registered as a professional engineer and filed a complaint with the Alberta Human Rights Commission. The Alberta Human Rights Tribunal was then in charge of judging the situation where they ruled in Mr. Mihaly's favor. Then the Court of Queen's Bench appeal reevaluated the situation to judge if the tribunal's decision should be reversed. Finally, the case ended when the Alberta Court of Appeal denied Mr. Mihaly's request to appeal against the Court of Queen's Bench's decision to reverse the Tribunal's ruling. There is much debate on which judgment is most fair and after detailed analyses of APEGA's regulatory process and requirements to be registered as a professional engineer, I was able to justify which decision I supported the most.

Stakeholders

APEGA

APEGA is an association of self-regulated professionals that regulate the price of engineering and geoscience in Alberta in accordance with Engineering and Geoscience Professions Act [EGPA]. A board of Examiners is established under section 30 of the EGPA [7] and is in charge of reviewing the application for registration as a professional member of APEGA. An individual cannot practice engineering in Alberta without approval by the registration. In 2014, APEGA was ordered to pay \$10,000 by the Alberta Human Rights Tribunal (AHRT) to Mr. Mihaly for general damages caused when APEGA required him to write examinations to confirm his credentials and grant him membership. In 2016, APEGA filed an appeal against AHRT's decision to the Court of Queen's Bench of Alberta and won.

The Court of Queen's Bench

The Court of Queen's Bench is the Province's Superior Trial Court and appeals from decisions of the Provincial Court for trials in civil and criminal matters. The Court also conducts judicial review of government and tribunal action in Alberta. The Court of Queen's Bench plays an important role in the appeal by APEGA against the Alberta Human Rights Tribunal's decision as well as Mr. Mihaly's cross-appeal for an award of \$1,000,000 and registration with APEGA. The Court of Queen's Bench held the appeal towards the end 2014 under the judgment of the Honorable Madam Justice J.M. Ross.

The Alberta Human Rights Commission

The Alberta Human Rights Commission is responsible for carrying out functions under the Alberta Human Rights Act. The Alberta Human Rights Act serves to protect Albertans from discrimination in areas that are based on specific grounds. The Commission fulfills their mission of fostering equality and reducing discrimination through public education and community initiatives, through

resolution and settlement of complaints of discrimination, as well as through human rights tribunal and court hearings. The Commission and Tribunal are in charge of appointing human rights tribunals, which are quasi-judicial administrative tribunals. Mr. Ladislav Mihaly's complaint against APEGA for discrimination was filed with the Alberta Human Right Commission.

Mr. Ladislav Mihaly

Mr. Ladislav Mihaly was born and educated in former Czechoslovakia where he studied at the Slovak Technical University in Bratislava and obtained a M.Sc. diploma with a specialization in Technology of Fuels and Thermal Energy in 1975. In 1981, he received a certificate in Corrosion Engineering from Institute of Chemical Technology (ICT) in Prague in 1981. He started applying to APEGA to be registered as a Professional Engineer in 1999 after he immigrated to Canada. His application process went through ups and downs where it was withdrawn and reactivated twice and he failed the National Professional Practice Exam three times. In 2008, he filed a complaint against APEGA for discrimination with the Alberta Human Right Commission.

Dean David Lynch

Dean David Lynch was a witness that provided evidence for APEGA'S registration process and evaluation of credentials of engineers by APEGA. He is the dean of the Faculty of Engineering at the University of Alberta. He held a representative position on the Board of Examiners, which is in charge of assessing the qualification of all applicants for registration, including Internationally Educated Graduates (IEGs). In addition, Dean Lynch has also been a member of the Canadian Engineering Accreditation Board (CEAB) for 11 years, which assesses engineering programs within Canada and outside to determine if their accreditation processes are comparable to Canada. He was part of the policy committee and was involved in the approval of the option to offer the Fundamentals of Engineering (FE) exam as confirmations for IEGs's qualifications.

Dr. Gary Faulkner

Dr. Faulkner is the second witness for APEGA and has been on the APEGA Board of Examiners since 1988. In 1995, He became the Chair of the Board of and has been ever since. Dr. Faulkner has a Ph.D. in Applied Mechanics where he obtained from the University of California in 1969. After obtaining his Ph.D., he returned to the University of Alberta and took a position in the Department of Mechanical Engineering and eventually became the Chair of the Department. Dr. Faulkner was able to offer insights on the review of Mr. Mihaly's application. He also testified about the National Professional Practice Examination and the option for applicants to write the FE exam.

Mr. Mark Tokarik

Mr. Mark Tokarik graduated with a Bachelor of Science in Engineering in 1981 and worked with Cambrian Engineering for about six years. He also has a Bachelor of Law from attending law school in 1989. He joined APEGA in 1999 as an Assistant Director of Registration and then became the Director of

Registration. In 2012, he was appointed as the Deputy Registrar for APEGA. As Director of Registration of 12 years, he had overall responsibility for the registration process. Mr. Tokarik was the third witness for APEGA and worked closely with Mr. Mihaly during his application to be registered as a Professional Engineer. Multiple letters, emails, as well as a phone conversation, were exchanged between Mr. Mihaly and Mr. Tokarik to clear up Mr. Mihaly's confusion about why he is required to complete confirmatory examinations.

Background

Cause of Mr. Mihaly's Complaint

The dispute between Mr. Ladislav Mihaly and APEGA was initiated by Mr. Mihaly's application to be registered as a Professional Engineer. Mr. Mihaly applied with a Masters degree from the Slovak Technical University in Bratislava and a Certificate in Corrosion Engineering from the Institute of Chemical Technology but was notified that his degrees do not meet APEGA'S academic requirements. Therefore he was advised that he needed to complete three confirmatory examinations plus a course or examination in Engineering Economics, or the Fundamentals of Engineering Examination (FE Exam) in addition to the National Professional Practice Exam [NPPE]. All applicants are required to pass The National Professional Practice Exam in order to demonstrate an understanding of the practice of Engineering or geoscience and the Engineering and Professionals Act [EGPA] as stated by section 15 of the Engineering and Geoscience Professions General Regulation [2]. Between the year 2000 and 2003, Mr. Mihaly wrote the NPPE three times and failed. His application was also withdrawn twice because he failed to complete the requested additional examinations at given dates.

In, 2007, the Board of Examiners reconsidered Mr. Mihaly's application and notified him that he has not yet acquired the required one-year of Canadian professional engineering experience because his previous position was not at a D level. Following this notification, Mr. Mihaly did not complete required examinations and filed a complaint in 2008 with the Alberta Human Rights Commission. He claimed that he was discriminated by APEGA because he was denied registration as Professional Engineer and the requirements imposed upon him are possibly contrary to the Alberta Human Rights Act.

Human right tribunal's decision

Mr. Mihaly's complaint was filed under section 4, 7 and 9 of the Alberta Human Rights Act [1]. Section 4 of the Act prohibits discrimination in goods, services and accommodation or facilities. Section 7 of the Act addresses discrimination in employment practices. Section 9 prohibits trade union, employers' organization or occupational association from excluding, expelling or suspending any members based on discriminations. Section 7 is found to be irrelevant because Mr. Mihaly was not employed by APEGA.

APEGA was represented by three witnesses, which testified for APEGA's Registration Standards that is separated into examination standard and experience standard. The first witness, Dr. David Lynch, provided insight on the

process of assessment for a university to gain accreditation from Canadian Engineering Accreditation Board [CEAB]. The second witness, Dr. Gary Faulkner Testified about the review of Mr. Mihaly's application and how Foreign Degree [FD] lists are formed. Dr Faulkner also testified that confirmatory exams are used for a large number of differing educational backgrounds from different countries. He said confirmatory exams were developed to cover the subject matter that APEGA would expect to see in someone who has graduated from a Canadian Accredited program and that these exams are developed by individuals at the University of Alberta or the University of Calgary. The third witness, Mr. Mark Tokarik gave further evidence regarding review of application process because he communicated closely with Mr. Mihaly throughout his application.

Mr. Mihaly testified that he was concerned about discrimination based on the country of origin when he found out that APEGA has a categorized list of countries used to assess foreign graduates. He even studied the Charter of Rights and the Act, and didn't find any exceptions in these documents that allowed Alberta Authority to judge graduates from universities in another country. In terms of experience, Mr. Mihaly explained that he as been working in Czechoslovakia as a Professional Engineer for 25 years and had worked in senior or lead engineering positions for various international companies. However in his 10 years in Canada, he has been unemployed for three years and working in low paying jobs for 5 years.

Based on the evidence provided by APEGA and Mr. Mihaly, the tribunal found that the confirmatory exam and the FE exam follows a one-size fits all approach, which is unhelpful to foreign engineers requiring assistance in understanding the APEGA process and its requirements. There was no meaningful "individual assessment" offered by the board since most interactions were through emails. In addition the FD list is made to from secondary "open source" information, as stated by Mr. Tokarik that is publicly available, which should not be the source of information for crucial categorization of qualifications. Furthermore APEGA's one-year Canadian Engineering experience requirement does not considered the challenges for foreign professionals to look for employment when they are not registered as a Profession Engineer. APEGA also did not offer any meaningful assistance or possible options for Mr. Mihaly to meet their qualifications. In conclusion, the tribunal ordered APEGA to award \$10,000 to Mr. Mihaly for general damages and that Mr, Mihaly succeeded in proving that the APEGA's Examination Standard and Experience Standard demonstrated discrimination that is not justified by the Act [3]. APEGA was also ordered to reconsider Mr. Mihaly's application and form a committee to review his perceived academic, to consider exempting him from exams and to provide him with a mentor that can provide him with the guidance to gradually integrate into the profession of engineering.

The appeal and cross appeal to the Alberta Court of Queen's Bench

In 2016, APEGA filed an appeal to the Alberta Court of Queen's Bench against the decision of Alberta Human Rights Tribunal. The issues of appeal that were analyzed were procedural fairness, Human right Tribunal's jurisdiction over

Mr. Mihaly's complaint, Prima facie discrimination and the justification for APEGA's standards [4]. After close analysis, the Queen's Bench Justice June Ross believes that the tribunal's reasons for APEGA to accommodate Mr. Mihaly are not logical and their findings are not supported by evidence and did not account for relevant considerations.

They also misinterpreted EGPR and made unsupported assumptions about the FE exam and how it prevents Foreign Engineers from registering with APEGA. In addition, the tribunal's request of providing guidance to Mr. Mihaly also need a significant dedication of resources and is unreasonable. The conclusion was that it is proven unreasonable to suggest Mr. Mihaly suffered prima facie discrimination by being required to complete confirmatory examinations or the FE Exam. In addition APEGA did not fail to justify the requirement of the Alberta Human Rights Act. In addition, Mr. Mihaly's also filed a cross appeal which is against the Tribunal's refusal to award him damages for loss of income, and seeks an award of one million and registration with APEGA, or alternatively 2 million if not registered as a professional engineer with APEGA. His cross-appeal was dependent on finding *prima facie* discrimination and was dismissed.

Court of Appeal

Mr. Mihaly filed an appeal after an Alberta Court of Queen's Bench judge reversed the tribunal's decision to the Court of Appeal of Alberta but failed follow up. Then he filed a restoration appeal because his appeal failed to be filed and was denied by the Court of Appeal of Alberta [5]. The final denial by the Court of Appeal of Alberta marks the end of the Mihaly v APEGA case.

The Court of Queen's Bench Decision

Four issues of appeal were analyzed to determine if the Human Right Tribunal's decision should be reversed. The issues are procedural fairness, jurisdiction, prima face, and justification

Procedural Fairness

This issue questions if the Tribunal breach the rules of procedural fairness by deciding issues that were not raised by parties, this is referring to the tribunal considering whether the APEGA requirements were justified under the AHRA. APEGA is claims that the tribunal based his decision on grounds that the parties did not advance, which did not give APEGA an opportunity to address. For this issue, the Queen's Bench Justice June Ross concluded that the tribunal had not established a breach of the rules of procedural fairness because APEGA had the opportunity to respond to all of the evidence and submissions made.

Jurisdiction

APEGA submitted that Tribunal had no jurisdiction over Mr. Mihaly's complaint because AHRA does not protect against discrimination based upon the "place of origin of academic qualification". APEGA submits that Tribunal should follow the definition of "Place of origin" outlined by the Court of Queen's Bench in the case of Grover v Alberta (Human Rights Human Rights Commission) where "place of origin" does not include place of education. However, it was found that Grover is

limited to its specific facts and is not a good test for this case. Therefore the tribunal did not lack jurisdiction over Mr.Mihaly's complaint.

Prima face discrimination

For this issue, the tribunal is responsible for proving that this case is a prima facie case of discrimination. Under the Moore test, complainants need to show that they have a characteristic that is protected from discrimination in order to prove a prima facie case of discrimination [4]. There is also a requirement for proof that this characteristic caused the individual to experience adverse impact.

Tribunal observed that Mr.Mihaly was indeed treated as a foreign graduate because of the origin or his educational credentials. Mr. Mihaly was adversely impacted by APEGA's requirements to confirmatory examinations of the FE Exam. These requirements were not applied to engineering graduates from Canada or countries with Mutual Recognition Agreements [MRA]. Dr.Lynch stated that the CEAB to determine follows an extensive process to evaluate if a country's accreditation process is equivalent to the Canadian process. This investigation begins when a country or institution within another country applies to go through the process. The tribunal believes that the barrier caused by examinations is caused by APEGA's assumption, which does not equate engineering qualifications from foreign countries without MRAs to the Canadian engineering accreditation standards. APEGA argues that no assumptions are made about the qualifications of graduates from an institution that have not gone through CEAB accreditation process, and untested engineering programs are not assumed to be inferior or equivalent, rather than unknown.

Queen's Bench Justice June Ross found that the Tribunal did not reference any evidence when they stated that APEGA's policies were based on discriminatory assumptions. The requirement to pass the NPPE is for all applicants, no matter where they are educated and this also supports non-discriminatory policies. In terms of APEGA's one year of Canadian engineering experience standard, it is justified by the importance for applicants to understand Canadian codes and how engineering is practiced amongst a team of individuals. In addition, there was no evidence that the required work experience had an adverse impact on Mr.Mihaly because of his national origin. He testified that he had difficulty finding a job without being registered as a professional engineer but later also admitted that engineering firms also usually refuse to hire engineers with more than six years of experience in junior positions.

Justification

Tribunal's main issue with APEGA is that they did not reasonably accommodate to Mr. Mihaly. He should have been individually assessed instead of having to write a standardized test to correct perceived academic deficiencies because exams like the FE exam does not consider an individual's background, specific training, and experience. This based on the assumption that the FE exam creates a barrier that prevents foreign-educated applicants from registering as professional engineers. This assumption is without the evidence that the FE exam is difficult to pass for internationally educated graduates with entry-level competence and it has a pass rate of 85% with retake options [4]. In addition, it

is unknown if Mr. Mihaly will have difficulty passing the FE exams because he never took one. Mr. Mihaly also had an issue with APEGA's assessment of his engineering experience but did not pursue an internal appeal for that decision when given the opportunity. This action fails to provide evidence for the Tribunal to prove APEGA'S decision wrong.

Confirmatory exams are developed by University of Alberta and University of Calgary and designed to cover subject matter suitable for graduates from a Canadian-accredited program. While the FE exam, developed by National Council of Examiners for Engineering and Surveying together with U.S. state licensing boards is tailored for graduates from accredited engineering programs that should possess the necessary test knowledge. These two exams are justified for assessing credentials and some tribunal even accepted that FE Exam is equivalent to Canadian Accreditation standards.

Judge's decision against Tribunal's requests

Based on analysis of the above issues the Judge concluded that the tribunal's requests were unreasonable. Their findings are not supported by evidence and failed to account for relevant considerations. This requested accommodation will need APEGA to fundamentally alter its standards and requires them to act outside its regulatory role. Employers do not have the duty to change working conditions in a fundamental way, as noted by the judge in the case of *Hydro-Quebec v Syndicat des employees de techniques professionnelles et de bureau d'Hydro-Quebec* [6]. Finally, the Tribunal's findings of prima facie discrimination in relation to the NPPE and the Canadian experience requirement were found to be unreasonable. The decisions of the Tribunal were reversed and the cross-appeal of Mr. Mihaly was dismissed.

Reflection and Opinion

The Mihaly v. APEGA case first went through the ruling of the Alberta Human Rights Tribunal where it was ruled in favor of Mr. Mihaly. Then APEGA appealed against the ruling to the Court of Queen's Bench and succeeded. Finally, Mr. Mihaly appealed against an Alberta Court of Queen's Bench judge's reversal of the tribunal's decision to the Alberta court appeal. After a close analysis of Alberta Human Rights Tribunal and the Alberta Court of Queen's Bench decisions, I am agreeing more with the reversal of the Tribunal's ruling. For the Alberta Human rights Tribunal's ruling, I find that it was based on too many assumptions that are missing evidence.

APEGA's examination and experience standards

The main argument was that APEGA's examination standard for testing an applicant's credentials is unfair because it was a one-size-fits-all approach instead of a more personalized way. I don't believe that the tribunal can prove that APEGA's policies are not justified simply because it did not offer more individual assessment or flexibility. This assumption puts public safety on the line because the examinations are justified ways to assess necessary credentials that assure the competency of professional engineers. It will be difficult to assure the consistency and quality of personalized tests for the verifications of foreign

graduates' credentials. In addition, personalized evaluations will be very expensive and inefficient simply unfair to APEGA. The tribunal's requests are also unfair because it will require too many resources that will require APEGA to act outside of its regulatory role. In addition, we cannot be sure if Mr. Mihaly will even have difficulties with the examinations because he has not attempted them yet. I also don't agree with the tribunal's assumption that APEGA's assessments create a barrier for all foreign applicants when FE exams have a pass rate of 85%. I find the tribunal's assumptions too weak to deny APEGA's form of assessment. The tribunal's requests for APEGA underestimates the importance of engineering competence for safe practice as a Professional Engineer and I fully support the reversal of their decision.

Discriminatory Assumptions in APEGA's policies

I fully support the Court of Queen's Bench opinion that APEGA's policies are not discriminatory especially when there isn't enough evidence proving it otherwise. I believe that APEGA's requirement for foreign graduates to take confirmatory examinations is not a discrimination against their place of origin, but simply a request for more information about their credentials. By creating these exams, APEGA is only trying to reassure that the candidates are competent to be registered as a professional engineer and is in no way underestimating their foreign institution's abilities. I think APEGA's standards are necessary to ensure that all registered Professional Engineers are qualified. In addition, there was also the requirement to pass the National Professional Exam, which is required for all applicants and therefore does not demonstrate discrimination. In terms of the requirement for applicants to complete one year of Canadian experience, I think it is absolutely crucial for someone who wants to practice engineering in Canada because it ensures that they are capable of understanding the Canadian code. Mr. Mihaly also had the opportunity to pursue an internal appeal against APEGA's assessment of his engineering experience but failed to do so which weakens his claim that APEGA's assessments are flawed because of the lack of evidence.

The above reasons are why I am more supportive for the ruling of the Court of Queen's Bench and the Alberta Court of Appeal's decision of denying Mr. Mihaly's appeal against Court of Queen's Bench's decision.

Accommodation for foreign-trained engineers

I understand that the process for foreign-trained engineers' to register with APEGA is full of challenges where they may be required to take examinations to prove their credentials. However, I believe that they should possess the knowledge to pass these examinations since the content was fairly created to ensure their competency to practice as Profession Engineers. I find the confirmatory examinations to be crucial in ensuring that the applicants can safely practice engineering in Canada. In addition, I believe that more personalized way for assessment should not be accommodated to foreign-trained engineers because it is not a controlled option to ensure their qualification. Especially when standardized tests are an efficient and secure way to provide an objective assessment. In addition, the cost and effort required to implement it will be challenging for APEGA

References

- [1]"Alberta Human Rights Act, RSA 2000, c A-25.5", Canadian Legal Information Institute, 2018. [Online]. Available: <http://canlii.ca/t/53319>. [Accessed: 15-Feb- 2018].

- [2]"ENGINEERING AND GEOSCIENCE PROFESSIONS GENERAL REGULATION", Qp.alberta.ca, 2018. [Online]. Available: http://www.qp.alberta.ca/documents/Regs/1999_150.pdf. [Accessed: 15-Feb- 2018].

- [3] "Mihaly v. The Association of Professional Engineers, Geologists and Geophysicists of Alberta, AHRC 1", (CanLII), 2014 [Online]. Available:<http://canlii.ca/t/g3051>. [Accessed: 15-Feb-2018]

- [4]"Association of Professional Engineers and Geoscientists of Alberta v Mihaly, ABQB 61", Canadian Legal Information Institute, 2016 [Online]. Available:<http://canlii.ca/t/gn3bs>. [Accessed: 15-Feb-2018]

- [5]"Mihaly v. The Association of Professional Engineers, Geologists and Geophysicists of Alberta, ABCA 15", Apega.ca, 2018. [Online]. Available: <https://www.apega.ca/assets/news-releases/2017-milhaly-court-decision.pdf>. [Accessed: 16- Feb- 2018].

- [6]"Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ) ", Canadian Legal Information Institute, 2008. [Online]. Available: <http://canlii.ca/t/1zhnr>. [Accessed: 17-Feb-2018]

- [7]"ENGINEERING AND GEOSCIENCE PROFESSIONS ACT", Qp.alberta.ca, 2015. [Online]. Available: <http://www.qp.alberta.ca/documents/acts/E11.pdf>. [Accessed: 15- Feb- 2018].