

# Mihaly v. APEGA: Public Safety in the face of Undue Hardship

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February 16, 2018

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[1] The Court of Queen's Bench, 1A Sir Winston Churchill Square, Edmonton, AB

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## **Introduction**

How far will we go to protect society? When do the safeguards we put in place become too extensive and harm rather than uphold the integrity of our profession as we originally intended? The Mihaly vs. APEGA case study explores these fundamental societal questions in what was one of the most controversial cases of its kind in Canada. Ladislav Mihaly was an engineer trained in Czechoslovakia during the 1970's who moved to Alberta and wanted to be recognized as a professional engineer by APEGA, but repeatedly failed and/or neglected to attend the required examinations. Mihaly's following lawsuit against APEGA on the basis of discrimination due to his place of origin sparked a heated legal debacle that would last the better part of a decade and would be closely followed by engineers and regulators alike.

## **Stakeholders**

### **APEGA**

The Association of Professional Engineers and Geoscientists of Alberta (APEGA) is the regulatory body which oversees engineering practice in Alberta as mandated by the federal and provincial governments. One of APEGA's many responsibilities is to test and provide professional licenses to prospective engineers and any foreign engineers wishing to practice professional engineering in Alberta ([www.apega.ca/about-apega/](http://www.apega.ca/about-apega/), APEGA). In the context of this case, APEGA was responsible for testing and evaluating Mr. Mihaly prior to granting him the title of a professional engineer, so that he could practice legally in Alberta. And, was the opposing party to Mr. Mihaly in the legal court cases that would come to follow Mr. Mihaly's initial testing.

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## **The Court of Queen's Bench**

The Court of Queen's Bench is the superior court of Alberta, which handles many types of trials and appeals decisions from the Provincial Court (<https://albertacourts.ca/qb/home>, Alberta Courts) . The Court became involved in the case between Mr. Mihaly and APEGA, when both APEGA and Mr. Mihaly appealed to The Court of Queen's Bench in response to the Human Rights Commission's belief that Mr. Mihaly was indeed unfairly discriminated against based on his place of origin.

## **The Alberta Human Rights Commission/Tribunal**

The Alberta Human Rights Commission (AHRC) holds tribunals and court hearings to solve disputes involving unfair/illegal discrimination. Since the initial grounds for Mr. Mihaly's legal case was that APEGA, by forcing him to write exams was discriminating against him because of his country of origin, the AHRC was very much involved in this case and was instrumental in one of the initial decisions against APEGA.

## **Mr. Ladislav Mihaly**

Ladislav Mihaly, arguably the most affected stakeholder in this case, initially applied to APEGA to be licensed as a professional engineer in 1999. However, after repeatedly failing and not attending required exams and subsequently being rejected of a license, he accused APEGA of discriminating against him based on his country of origin. The case would end up being appealed multiple times by both sides, going through 3 separate legal bodies before ultimately ending in a decision in favor of APEGA in 2017.

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## **The Public**

The primary purpose of testing and licensing engineers is so that the public can be confident that engineers are competent and the work they perform follows applicable codes/regulations and is safe for use. Since the courts, APEGA, and other judiciary/regulatory bodies are funded by the public, to serve the public, it's clear that the public is a key stakeholder in this dispute.

## **Licensed Professional Engineers**

Engineers already licensed by APEGA want to ensure any new engineers to Alberta are competent and have similar training/knowledge as them in order to communicate easier and work with them more efficiently and effectively. If there is a breakdown in the system and engineers are not being thoroughly evaluated before being granted a license, existing engineers may lose confidence in the system and their colleagues. Licensed engineers would also want to ensure that Mr. Mihaly doesn't get special treatment over them as it wouldn't be fair if Mr. Mihaly was granted exemption from examinations that they weren't.

## **Prospective Professional Engineers**

Engineers with foreign training who are interested in getting licensed in Alberta would surely be interested in the Mihaly vs. APEGA case and its subsequent outcome. The case would be of particular interest to them, as it serves as a guideline on how to properly be licensed in Alberta i.e. learn from Mr. Mihaly's mistakes. They would want to ensure they receive fair/equal treatment and increase their chances as much as possible to get licensed.

## **Background**

In 1999 a prospective professional engineer from Czechoslovakia; Ladislav Mihaly applied to APEGA to be registered as a professional engineer. APEGA's Board of

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Examiners upon examining all of Mr.Mihaly's relevant documents decided to issue him the NPPE ( National Professional Practice Exam ), the standard 3 technical exams, and an engineering economics exam. Mr.Mihaly would go on to fail the NPPE three times between 2000-2003 and subsequently had his application rejected by APEGA. Later in 2006, Mr.Mihaly had his application activated again whereupon the Board of Examiners re-reviewed his credentials and informed him he must write and pass the NPPE, the technical exams or the equivalent FE exam, and obtain at a minimum 1 year of engineering experience in Canada. Mr.Mihaly didn't attend any of the exams issued by APEGA in 2008, but instead chose to file a human rights violation against APEGA claiming discrimination based on his place of origin.

The alleged human rights violation on APEGA's part is investigated between 2008 and 2012 but is not put to a hearing and is later dismissed. Mr.Mihaly would go on to appeal to the Chief Commissioner, who would put the complaint to a hearing with The Alberta Human Rights Commission. The Human Rights Commission comes to a consensus that the method which APEGA used to review Mr.Mihaly's credentials constituted discrimination that could not be justified under the Alberta Human Rights Act. The Human Rights Commission awarded Mr.Mihaly \$10,000 in damages in 2014 and directed APEGA to reconsider his application, assign a mentor to Mr.Mihaly, and appoint a committee to assist Mr.Mihaly with entering into the profession. APEGA hears Mr.Mihaly's appeal to reconsider his application and Mr.Mihaly cross-appeals to increase his damages from \$10,000 to potential millions. Both parties; APEGA and Mr.Mihaly subsequently appeal to the Alberta Court of Queen's Bench in 2015. The Alberta Court of Queen's Bench overturned the Human Rights Commission's decision in January 2016, as the AHRC's decision contained several errors including facts that were not supported by proper or substantial evidence and "unreasonable interpretations" (Mihaly v. APEGA: Lessons learned, Casey) of the legislation. Mr.Mihaly's cross-appeal was subsequently dismissed by The Court of Queen's Bench, due to various errors.

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After the decision from the Court of Queen's Bench had been made, Mr. Mihaly filed an appeal with the Alberta Court of Appeals but did not take the necessary steps to ensure that the appeal would move forward. He then reapplied to the Court of Appeals to have his appeal restored so that it could move forward, but the Court of Appeals refused to have it move any further in 2017, finding that Mr. Mihaly did not show any patent error in the decision of the Court of Queen's Bench. APEGA remains firm that the systems in place for examining prospective international engineers is fair and is the same for all applicants regardless of place of origin, it is paramount that the safety of public is upheld and any decision/exceptions granted that could increase the risk to public safety can not be allowed to pass.

## **The Court of Queen's Bench Decision**

Following the Alberta Human Rights Tribunal decision on February 6th, 2014 which found APEGA discriminated against Mr. Mihaly based on his country of origin, APEGA appealed the decision to the Court of Queen's Bench of Alberta. Mr. Mihaly filed a cross-appeal citing the Tribunal's decision not to award him damages for loss of income, he also sought \$1,000,000 and registry with APEGA or \$2,000,000 with no registration as a P.Eng.

APEGA raised many concerns with the way the Tribunal handled the case. Firstly, did the Tribunal break rules regarding procedural fairness when they made decisions based on evidence and findings which were not raised with the two parties involved? Secondly, did the Tribunal overstep their boundaries when making the decision that discrimination based on place of education is equivalent to discrimination based on place of origin? Furthermore, did the Tribunal accurately assess Mr. Mihaly's circumstance as *Prima facie* discrimination, which is discrimination based on account of victim with no evidence from the defendant to the contrary (Proving Discrimination, Human Rights Legal Support Centre). And



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lastly, was the Tribunal's ruling that APEGA's registration process was unreasonably excessive baseless?

In terms of the first issue, the Court referenced a similar case; *Pope and Talbot Ltd v British Columbia, 2009 BCSC 1715* and found that the rules of procedural fairness had not been breached as no new considerations had been raised by the Tribunal without notifying either party beforehand. The Court also ruled that the Tribunal was not overstepping its jurisdiction when determining whether or not discrimination based on place of education vs origin were one in the same as the correct legal test for determining *Prima facie* discrimination was carried out by the Tribunal. This *Moore test* involves the complainant proving whether or not they have a characteristic that is protected from discrimination, that they experienced an adverse impact, and that that characteristic played a role in their adverse impact. However, the Court also found that the Tribunal's ruling of *Prima facie* discrimination against Mr. Mihaly to be baseless and that APEGA's testing procedures did not constitute unreasonable discrimination as the Tribunal failed to apply the Moore test in relation to APEGA's testing procedure, which is required by all applicants regardless of place of origin/education. Despite the fact that the Court agreed with the Tribunal that Mr. Mihaly faced discrimination by APEGA's testing requirements, the Court ruled that this discrimination was justified in order to ensure public safety and guarantee that APEGA registered engineers are competent.

Ultimately, Queen's Bench Justice June Ross ruled that the tribunal's ruling was "rife with logical errors" (Mihaly v. APEGA: Lessons learned, Casey), contained "failures to take into account relevant considerations", and "findings of fact unsupported by the evidence" as well as making "unreasonable interpretations". The Tribunal's decision was therefore overturned and Mr. Mihaly's cross-appeal was dismissed. The Court found that there was too much room for uncertainty regarding Mr. Mihaly's inability to gain a license and his lost potential wages to award him the damages in

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question. Mr. Mihaly would go on to appeal the Court of Queen's Bench decision with the Court of Appeals in 2017, but would be denied with the Court of Appeals finding that Mr. Mihaly's appeal did not contain any "patent error" (Court of Queens Bench of Alberta, Ross).

## **Reflection and Opinion**

The Mihaly vs. APEGA case was a long heated showdown that involved multiple parties throughout the long winded legal escalation and the differing decisions of those parties that would define the final outcome. We as a group agree with the decisions of the Court of Queen's Bench and the Alberta Court of Appeals' decision that Mr. Mihaly's allegations against APEGA had no legal basis. The Court of Queen's Bench decision ultimately came from the fact that the AHRC Tribunal and Mr. Mihaly's claims were insufficient to establish unjustified discrimination, either because of a lack of evidence or the Tribunal's misunderstanding of APEGA's policies and role as a regulator. An example of this is the Tribunal's argument that requiring the writing of the NPPE and technical exams to prove sufficient competence constituted unjustified discrimination, as it assumed that Mr. Mihaly had an inferior academic understanding based on his place of origin. However, this claim is easily dismissed as APEGA requires these exams from all foreign applicants regardless of where they have been educated to ensure they have an acceptable level of comprehension. Therefore, while the testing that was asked of Mr. Mihaly may have been discriminatory in nature, it was justified in order to ensure public safety and welfare. As a group we agree with the Court's view that the discrimination inherent in the testing procedures was needed as it remediated safety concerns that would've been apparent if Mr. Mihaly had been exempted from the tests.

The Alberta Human Rights Commissions' decision to have APEGA accommodate Mr. Mihaly with exemptions from the required tests, a mentorship program, and a dedicated committee to assist him with entering the engineering profession is



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fundamentally inappropriate, as these orders would require APEGA to act outside of its regulatory role. Additionally, if APEGA was mandated to follow these orders and accommodate Mr. Mihaly, it would set a dangerous precedent in place for special treatment and exemptions that would significantly impact the safety and welfare of the public in the future. It should also be noted that Mr. Mihaly as an applicant seeking accommodation, neglected his responsibility/duty to cooperate by not attending or even attempting the FE exam, not bringing up any human rights violation concerns to APEGA prior to filing a complaint to the AHRC, and having no intentions to cooperate in any manner with APEGA. The accommodation of foreign engineers by APEGA or any other engineering association should only occur when a legitimate human rights violation occurs and the engineering association/APEGA does not have to act outside the boundaries of its regulatory role. Additionally, in order to have proper accommodation, both parties must abide by their individual duties, in the Mihaly v. APEGA case this did not occur as stated prior. In closing, when true discrimination occurs it may be necessary to provide accommodations, but these accommodations should never take precedence over the safety and wellbeing of the public.

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