

ENGG 513

Analysis and Reflection on *Mihaly vs. APEGA*

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Introduction

In *Mihaly vs. APEGA*, Mr. Ladislav Mihaly accused APEGA of discriminating against him when considering his application to become a licensed professional engineer based on his place of origin. This case deals with the relation between the rights of a professional organization, such as APEGA (previously APEGGA), to manage admission into the organization and an individual's human right to not be discriminated during the admission process. This case puts to the test the extent to which an organization like APEGA can exercise its power to accredit professional workers without infringing on the human rights of applicants. The legal precedence set by this case reflects directly on the roles and values of professional engineering associations in Alberta and Canada. It demonstrates the importance of these associations and asserts their responsibilities to protect the public interest.

The proceedings of this case, which I summarize in this report, illustrates some of the difficulties sometimes encountered while attempting to regulate the engineering profession. They demonstrate the importance of knowledge about the engineering practice and of considering all information available when making a decision. They also affirm the requirement of evaluating the competence and skills of professional engineers. Lastly, this case shows the critical role that engineering organization like APEGA play in protecting the public.

Stakeholders

APEGA

APEGA is the organization responsible for regulating engineering practice in Alberta. It provides licensing for engineers to practice their discipline professionally and sets the requirements for licensing as well. Only engineers who are licensed members of APEGA are allowed to use the Professional Engineer title in Alberta. It also acts as a disciplinary body for professional engineers who violate some of the high standards imposed by APEGA and for unlicensed individuals practicing engineering.

As the respondent to the complaint to the Human Rights Commission of Alberta by Mr. Mihaly, APEGA had a vital interest in the outcome of this case. Having been accused of a human rights violation under The Alberta Human Rights Act (AHRA), APEGA had to either demonstrate that it did not violate Mr. Mihaly's human rights or that it was justified in its violation under the Act [1, section 11].

Mr. Ladislav Mihaly

Mr. Ladislav Mihaly is a chemical engineer, born in former Czechoslovakia. He has a Masters degree from the Slovak University of Technology in Bratislava and a second Masters from the Institute of Chemical Technology in Prague. He also has over 12 years of experience working as an engineer internationally.

Having been the one to submit the complaint to the Alberta Human Rights Commission, it is clear that Mr. Mihaly is directly affected by the outcome of this case. His role in the case was to demonstrate that APEGA unreasonably discriminated against him on the grounds of a trait protected by the AHRA. If APEGA were to have been found to have violated his human rights, he would have benefitted from any damages awarded by the Human Rights Tribunal of Alberta, likely in the form of monetary compensation.

The Alberta Human Rights Commission

The Alberta Human Rights Commission is an organization established under the AHRA. It is responsible for carrying out functions under the Act to protect and promote human rights in Alberta. Some of its primary functions under the Act include [1, section 16]:

- to promote the principle that all people are equal
- to promote awareness of the multicultural heritage of Albert
- to encourage the provision of equal opportunity
- to promote understanding and acceptance of the AHRA

When dealing with a human rights complaint submission, the Alberta Human Rights Commission can appoint a Human Rights Tribunal to judge the issue. As a quasi-judicial administrative tribunal, it hears the evidence presented by all parties involved in a complaint and decides whether the complaint has merit. If it does, then it orders some form of remedy [2], [3].

The Alberta Court of Queens Bench (QB)

The AHRA allows for parties in a case to appeal the decision and orders of a Human Rights Tribunal to the Court of Queen’s Bench [1, section 36].

The Court of Queen’s Bench (QB), is the name given to Alberta’s superior court. It has the jurisdiction to hear all civil and criminal cases in a province [4, chapter 3]. It can also accept appeals from inferior courts and tribunals. Of importance to this case is that, under the AHRA, the QB has the power “confirm, reverse or vary the order of the human rights tribunal” [1, section 37 (4)].

The case of *Mihaly vs. APEGA* arrived at the QB as an appeal by APEGA and cross-appeal by Mr. Mihaly. APEGA appealed the decision of the Human Right Tribunal, arguing that it was unreasonable. Mr. Mihaly, on the other hand, appealed the awarded remedy, claiming he should have received further compensation. The importance of the QB’s decision, in this case, is mainly related to the precedent it sets for future cases of a similar nature.

The Alberta Court of Appeal

Following the decision of the QB, Mr. Mihaly appealed to the Alberta Court of Appeal.

The Court of Appeal is the highest level of court in Alberta. The only other court that is at a higher level is the Supreme Court of Canada. The court of appeal hears appeals from the QB and, in some cases, directly from provincial inferior courts [5, chapter 7]. Typically, the Court of Appeal does not hear or rehear witnesses and accept new evidence. Instead, it examines the written transcripts of previous trials and listens to the legal arguments. It only considers errors in law made by lower courts **vagonelseon**. Also, it can also answer hypothetical questions put by the provincial government in power [6, chapter 7]. This power gives decisions by the Court of Appeal strong precedent capable of influencing not only future rulings of the QB but also the making of future legislation.

Engineering Associations in other Canadian Provinces

Since the structure and role of engineering associations in all Canadian provinces are similar, they can look to how others have resolved conflicts to resolve their own. In a sense, this case impacts the perception of the engineering profession and engineering organizations in Alberta. Because the engineering profession is regulated similarly in all provinces, this effect may also have an impact on other engineering organizations in other provinces as well.

The General Public

Mihaly vs. APEGA is a case that fundamentally deals with the issue finding a balance between protecting the public and protecting individual human rights. The public is therefore directly impacted by the final resolution of the case. Neither tolerating human rights violations nor endangering the public are in the public interest. Both are equally important to maintaining the well-being of the general public. An imbalance either way could set a precedent that endangers the welfare of individuals and groups in future cases. This potentially very significant impact on society necessarily makes the public a key stakeholder in the case.

Background

The background information relevant to the case is described in the **background** section of the Human Rights Tribunal’s report [7] and is summarized in this section.

The case began with Mr. Ladislav Mihaly application to join APEGA (then APEGGA) in 1999. As part of this, he described the education he received in his place of birth, former Czechoslovakia, as well as his prior experience working as an engineer outside of Canada for 25 years.

APEGA considered his application and requested additional documents. APEGA also asked that he write the National Professional Practice Exam (NPPE). This exam is used to evaluate and confirm the competency in the areas of professionalism, law and ethics, of non-Canadian educated engineers [7, paragraph 190].

After thoroughly examining his application, APEGA requested that Mr. Mihaly also complete three confirmatory exams, intended to evaluate his competence in specific areas of his field of engineering. He also had to either take a course in Engineering Economics or take an equivalent exam, proving his competence in the subject. These exams were required because of his non-Canadian engineering degrees. However, because his degrees were on the Canadian Council of Professional Engineers Foreign Degree List (FD list), he was exempt from having to write six additional exams.

Mr. Mihaly applied to write and did write the NPPE. However, he did not pass the exam on this first attempt. He, therefore, applied to re-write the exam but failed to attend the writing session.

After failing to attend his second attempt to write the NPPE, APEGA withdrew his application, also noting that he had not written the required confirmatory exams.

Later, Mr. Mihaly requested that APEGA reactivate his application as he was re-applying to write the NPPE. APEGA did as he asked and reminded him that he also had to write the confirmatory exams.

Once again, Mr. Mihaly failed the NPPE. APEGA also withdrew his application a second time because of his failure to write the confirmatory exams.

At Mr. Mihaly’s request, APEGA reactivated his application. Given the time that had passed, the Board of Examiners re-evaluated and his application, concluding that Mr. Mihaly still had to write the confirmatory exams and take a course in Engineering Economics (or write an equivalent exam). Also, the Board found that Mr. Mihaly had not adequately acquired one year of experience working as an engineer in Canada under the supervision of a licensed professional engineer.

Mr. Mihaly did not write the confirmatory exams and filed a complaint with the Alberta Human Rights Commission. He complained that requiring him to write confirmatory exams discriminated against him based on his place of origin, which the Alberta Human Rights Act (AHRA) prohibits[1]. The complaint went in front of a Human Rights Tribunal.

The Tribunal found that there was a case of substantive discrimination, i.e., APEGA discriminated Mr. Mihaly on the basis of a trait protected under the AHRA. The basis of discrimination was Mr. Mihaly’s place of origin. The discriminatory act was APEGA’s assignment of confirmatory exams, which poses a barrier to entry for engineers trained in foreign institutions. According to the Tribunal’s findings, the need for these tests originated in APEGA’s assumption that engineers trained in foreign institutions, with no Mutual Recognition Agreements (MRAs) with APEGA, have qualifications that are not on par with Canadian-trained engineers. It also found that APEGA had not reasonably accommodated Mr. Mihaly, relying on standardized tests to evaluate his competence and skills [7, paragraph 211](quoting Meiorin firefighter case). Furthermore, the Tribunal found that APEGA should proactively discuss and negotiate with the foreign

institutions training engineers coming to Alberta, instead of relying on general information [7, paragraphs 201-203]. As remedies, the Tribunal awarded \$10,000 in damages and ordered APEGA to reconsider Mr. Mihaly's application.

Both Mr. Mihaly and APEGA appealed the Tribunal's decision. This moved the case to the Alberta Court of Queen's Bench (QB).

After the hearing, the QB reversed the decision of the Tribunal. It disagreed with the Tribunal's finding of substantive discrimination against Mr. Mihaly, finding APEGA's process to be reasonable [8, paragraph 150]. The QB found that the adverse impact suffered by Mr. Mihaly, failing the exams) was not related to his place of origin. Furthermore, it found that the requirement to write confirmatory exams was not discriminatory because all applicants were required to demonstrate their competence. Also, the requirement to write confirmatory exams was not based on assumptions of educational deficiencies but a requirement to evaluate the quality of education of applicants. In addition, the QB found the Tribunal's expectation that APEGA should proactively discuss and negotiate with foreign institutions when evaluating candidates to be unreasonable [8, paragraph 121]. It found that APEGA could not have adequate information about all international engineering programs, making confirmatory examinations and the FE the only viable approach for evaluating foreign applicants.

Mr. Mihaly then appealed the decision of the QB, which brought the case to the Alberta Court of Appeal. However, he did not adequately pursue the appeal. The court, therefore, dismissed it [9].

The Court of Queen's Bench decision

As was stated above, during the appeal of the decision made by the Human Rights Tribunal, the QB reversed the decisions made by the Tribunal. This meant that APEGA did not unjustifiably discriminate Mr. Mihaly based on his place of origin, did not owe him any damages, and did not need to further accommodate him nor to engage more directly with foreign institutions training engineers that come to Canada.

The appeal of the Tribunal's decision was placed by APEGA. Mr. Mihaly also cross-appealed the decision, arguing that the Tribunal should have awarded him further damages to compensate for lost income.

APEGA's appeal had four major points. The appeal asked whether [8, paragraph 54]:

1. the so-called "procedural fairness" of the Tribunal
2. it was within the Tribunal's jurisdiction to decide whether discrimination based on the place a person receives their education qualifies as discrimination based on place of origin
3. **prima face** discrimination had been correctly determined by the Tribunal
4. the Tribunal's finding that APEGA's alleged discrimination was unjustified was unreasonable

Regarding the question of procedural fairness, APEGA tried to argue that quotation of section 8 of the Engineering and Geoscience Professions General Regulation (EGPR), which had not been raised by either party, in the Tribunal's final decision was unfair. APEGA argued that it was not given a fair opportunity to respond to the previously unraised point. However, the QB found that Tribunals (and courts) are only required to give parties the opportunity to respond to new *grounds* being raised during a trial. For example, if new evidence had been uncovered regarding the case. The QB, therefore, concluded that there was no breach of procedural fairness in the raising section 8 of the EGPR [8, paragraphs 55 to 59].

The second point in APEGA's appeal questioned whether it was in the Tribunal's jurisdiction to decide whether discrimination based place of education qualifies as discrimination based on place of origin. APEGA argued that "pace of origin" does not encompass "place of education", quoting *Grover v Alberta Human Rights Commission* [10]. However, the QB found that the issue was more appropriately addressed by the more recent case of *Moore v British Columbia (Education)*[11]. The court found that this case defines the test for *prima face* discrimination and does not prohibit "place of origin" to include "place of birth". The QB, therefore, ruled that the Tribunal acted within its jurisdiction in determining whether there was discrimination based on place of origin [8, paragraphs 60 to 69].

For the question of the Tribunal's establishment of the *prima facie* case of discrimination, APEGA argued that "differential treatment could be discriminatory only if it were based upon stereotypical and arbitrary criteria that perpetuated disadvantage" [8, paragraph 80]. APEGA also argued that there was no evidence showing that its application process for engineers educated outside of Canada where based on "discriminatory assumptions". The QB agreed with APEGA on the second argument and found that the process was based on "knowledge about the programs" and not discriminatory assumptions [8, paragraph 86]. In addition, the QB also found that the Tribunal had failed to properly apply the *Moore* test and that its finding of *prima facie* discrimination was unreasonable [8, paragraphs 70 to 109].

Regarding the fourth and final point in APEGA's appeal, the Tribunal had found that APEGA did not reasonably accommodate Mr. Mihaly, making the *prima facie* case of discrimination unreasonable or unjustifiable. APEGA argued otherwise. The QB first found the Tribunal's decision to be unreasonable because it requested justification for more than just the actions relevant to the *prima facie* case of discrimination [8, paragraph 117]. Specifically, it had included the writing of the NPPE exam as requiring justification, even though it had not included this as part of the *prima facie* case of discrimination. The QB also found the Tribunal's position that the standardized tests were unjustified to be unreasonable. It pointed out that using a standardized testing by itself is not discriminatory; it is the *standard* that testers are held to that may be discriminatory. The report cites case of *British Columbia (Public Service Employee Relations Commission) v. BCGSEU* [12] in support of this argument. Lastly, it also found that it was unreasonable to expect APEGA to change its role as a regulatory organization in order to accommodate engineers with foreign education [8, paragraphs 110 to 150].

The Tribunal's failures regarding APEGA's third and fourth questions in the appeal resulted in the QB reversing the Tribunal's decision [8, paragraph 153]. The QB also dismissed Mr. Mihaly's cross-appeal as it relied on a finding that the *prima facie* case of discrimination had been unjustified [8, paragraph 154].

Reflection and Opinion

To start, I found it difficult to agree with many aspects of the Human Rights Tribunal's decision. It seemed rather apparent that several pieces of relevant evidence were overlooked. Most importantly, the Tribunal appeared to completely disregard the fact that Mr. Mihaly did not even attempt to write the confirmatory exams or the FE exam [8, paragraph 148]. He did not provide any reason or justification for this either, making it difficult to defend the argument that these are discriminatory. Although not strictly required by law, an essential aspect of constructing strong cases of this kind is to provide evidence that one has incurred some form of hardship or difficulty. I find it difficult to justify that any action is discriminatory if there is no evidence for why and how such an act is problematic.

Another example of overlooking critical facts is how the Tribunal seemed to think APEGA was not doing enough to evaluate foreign candidates, despite having been shown the complicated process used to evaluate both candidates and international institutions. This oversight, to me, suggests an evident lack of understanding of the purpose of APEGA and the engineering profession in general.

The decision of the QB, on the other hand, was much easier to follow. It pointed out the legal shortcomings of the Tribunal's decision and corrected them. The confirmatory exams and the FE exam could not be discriminatory since it did place a barrier to entry to a disproportionate group. It is, however, worth noting that it also agreed with the Tribunal in some ways as well. Under the AHRA, it had the option to vary the decision of the Tribunal. The fact that it completely reversed the decision underlines the importance of the points that were missed by the Tribunal.

I don't think much can be said about the conclusion of the Court of Appeal. The case was dismissed merely because Mr. Mihaly did not follow through with the process as required.

To me, the general direction taken by the Tribunal's decision is a demonstration of the importance of regulating the engineering practice. The oversight of critical pieces of evidence shows a lack of understanding of how APEGA works and how the engineering profession is regulated. The QB's decision strengthens the importance of considering the distinctive aspects of engineering when dealing with its interactions with the law. The work done by engineers necessarily requires specialized knowledge and skills. This fact is also true

when dealing with engineering and the law. Had the case been arbitrated by someone with more experience working with engineers (and possibly other professional organizations), it might have concluded much more quickly.

Lastly, the outcome of the case as a whole sets an important precedent for future cases. It recognizes the importance of ensuring that engineers are well trained and experienced, no matter where they received their education. I think this will be very important in the future as the world becomes more globalized and more engineers immigrate to and from Canada. This case puts protecting the public by accrediting professional engineers on the same level as protecting people's human rights.

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