

# **APEGA VS MIHALY**

**ENGG 513: The Role and Responsibilities of Professional Engineer in Society**

**Prepared for: Dr. Denis Onen**  
**Prepared by: Noshin Karim and Nowshin Nowal**

**Date: February 16, 2018**

## **TABLE OF CONTENTS**

Introduction	Page 3
Stakeholders	Page 3
Background	Page 4
The Court of Queen's Bench Decision	Page 5
Reflections and Opinions	Page 8
References	Page 9

## **INTRODUCTION**

When Ladislav Mihaly, a Czechoslovakian engineer, moved to Canada, he filed an application with APEGA to obtain his professional engineering license. APEGA responded by stating that Mihaly had to complete various exams and obtain Canadian engineering experience before he would be awarded his license. After failing the exams multiple times and struggling to find a job to obtain the relevant work experience, Mihaly filed a case against APEGA, stating that they were discriminating him from getting his license because of his place of origin. This case expanded to involve major law courts, such as the Alberta Human Rights Commission, the Court of Queen's Bench of Alberta and the Alberta Court of Appeal. The case concluded with APEGA found to have not discriminated Mihaly because of his place of origin. The purpose of this report is to gain and understand the requirements needed to become a registered professional engineer, and to investigate the rules and regulations in Canada and APEGA's regulatory process. This report shows the legal procedures of APEGA's operation and how their regulations eliminate the gray zone between the requirements for becoming a registered professional and discrimination. Furthermore, this case proves the importance and significance of correct and related knowledge and experience in every sector related to public interest and safety, and how this is the most important concern of any self-regulating profession.

## **STAKEHOLDERS**

### **Ladislav Mihaly**

Ladislav Mihaly complained to the Alberta Human Rights Commission claiming that he was being discriminated against being registered as a professional engineer in Alberta because of his country of origin. Since he was a foreign-educated engineer, he was asked to write various exams and obtain engineering experience in Canada by the APEGA Board of Examiners before he could obtain his license.

### **APEGA (Associations of Professional Engineers and Geoscientists Alberta)**

APEGA believes that the public safety and interest must be the highest priority and concern of the engineering profession. Hence, for foreign trained engineers, such as Mihaly, APEGA requires them to complete certain exams and obtain Canadian engineering experience before they can obtain their license. Mihaly accused that these requirements showed that APEGA was discriminating against foreign educated engineers.

### **Alberta Human Rights Commission (AHRC)**

Mihaly brought the discrimination complaint against APEGA to the AHRC. After examining the evidence provided by both parties, the AHRC found that APEGA was discriminating Mihaly by not giving him his license. They asked APEGA to pay, and form a committee to review Mihaly's academic credentials, and provide him with a mentor.

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

Following the ruling from the AHRC, APEGA appealed the tribunal's decision to the Court of the Queen's Bench of Alberta. The hearing occurred on July 23<sup>rd</sup> and 24<sup>th</sup>, 2015, with Madam Justice June Ross as judge. There were four main topics that were discussed during this hearing: procedural fairness, jurisdiction, prima facie discrimination and justification. The Court of Queen's Bench found that the tribunal was wrong, and that APEGA was not guilty of discriminating against Mihaly.

## **Field Law LLP**

Field Law LLP represented APEGA during the Court of Queen's Bench of Alberta hearing; Field Law LLP investigated on past cases and APEGA's regulations.

## **Chivers Carpenter**

Chivers Carpenter represented the AHRC during the Court of Queen's Bench of Alberta hearing; Chivers Carpenter investigated more on Human Rights and discrimination on Mr. Mihaly.

## **Albert Court of Appeals**

Mihaly appealed the decision of the Court of Queen's Bench of Alberta to the Alberta Court of Appeals. However, through a combination of not proving merit of his appeal, as well as delaying his application, the Alberta Court of Appeals rejected his appeal. This marked the end of the case between Mihaly and APEGA.

## **BACKGROUND**

Ladislav Mihaly was born in Czechoslovakia, where he obtained a M. Sc. Diploma in Technology of Fuels and Thermal Energy from the Slovak University of Technology in Bratislava. He also obtained a Certificate in Corrosion Engineering from the Institute of Chemical Technology in Prague. After moving to Alberta, he applied for his engineering license in May 1999. In February 2000, APEGA's Board of Examiners asked him to pass the National Professional Practice Exam (NPPE), finish three confirmatory exams, and take a course or an equivalent exam in Engineering Economics by May 2001 in order to obtain his license. In June 2001, APEGA told Mihaly they withdrew his application because he did not write his confirmatory exams by the May 2001 deadline. Mihaly requested that his application be reactivated. In 2002, APEGA reactivated his application, saying he still had to meet the initial requirements by 2003; however, since Mihaly failed to write the confirmatory exams by this deadline, APEGA deactivated his application again. In 2006, Mihaly asked to have his application reactivated once again. The Board of Examiners revived his application, restating they required him to write the confirmatory exams, a course or exam in Engineering Economics, or the Fundamentals of Engineering (FE) Examination and acquire one year of Canadian engineering experience. Over the course of this period, Mihaly attempted the NPPE four times; he failed three times and did not show up another time, stating he was not able to attend because

he was in a car accident. Furthermore, Mihaly did not write the other required exams, despite the repeated requests by the Board of Examiners for him to do so.

In August 2008, he complained to the AHRC, claiming that, since he was not given his license, he was being discriminated by APEGA because of his place of origin (generally defined as where one is born). In 2014, the AHRC's tribunal ruled that the tests Mihaly was asked to write were indeed discriminatory, saying that "to assess his educational credentials, without more individualized assessment or exploration of other options, constitutes discrimination which cannot be justified under the AHRA [Alberta Human Rights Act]" [10]. APEGA was also asked to reconsider Mihaly's application and pay \$10 000 in damage. Additionally, they were asked to form a committee to apply "individual assessment options... with a view to correcting perceived academic deficiencies" [6], review Mihaly's academic qualifications, attempt to exempt him from the exams he was required to write, set him up with an engineering professional as a mentor, and direct him to networking and language training resources.

APEGA appealed the decision of the ARHC's tribunal to the Court of Queen's Bench of Alberta. During this hearing, four major topics were discussed with regards to the tribunal's ruling on procedural fairness, jurisdiction, prima facie discrimination and justification (further explanation of these topics can be found in the section below). This hearing concluded with the Court of Queen's Bench of Alberta reversing the decision of the tribunal, saying that the tribunal's decision was "rife with logical errors, findings of fact that are not supported by evidence and failures to take into account relevant considerations" [11].

Mihaly appealed the decision of the Court of Queen's Bench in February 2016 with the Alberta Court of Appeal, but he did not follow through with perfecting his appeal. Hence, in June 2016, the appeal was considered not filed with the Appeal Record. In December 2016, Mihaly applied to restore his appeal. To restore an appeal, the appellant must fulfill the following five conditions: 1) Prove the appeal has an arguable merit; 2) Explain why the appeal was delayed; 3) Show promptness to restore the appeal; 4) Intend to proceed with the appeal over time; 5) Not show prejudice towards the other party (this includes how long the delay is). Mihaly failed to meet the first condition of restoring his appeal (i.e. the merit of the appeal). Mihaly said that the Foreign Degree (FD) List, which was used by APEGA, was dated 2010, but his assessment should have happened between 2000-2006; however, his qualifications were not assessed differently in 2010 than it would have been at a prior time. Furthermore, this argument was nonsensical, as the FD List helped to prove that his degrees were equivalent to a Canadian bachelor's in engineering degree. Mihaly also referred to the Canada/European Union Agreement for Cooperation in Higher Education and Training, and the 1979 UNESCO Convention on the Recognition of Studies, Diplomas and Degrees concerning Higher Education in the States belonging to the Europe Region, but was not able to prove that they had to consider his European educational requirements as equivalent to Canada's requirements. Mihaly also failed to meet the second, third and fourth conditions of the appeal requirements, as he did not give any explanation for the delay and did nothing to perfect his appeal (e.g. he did not obtain transcripts or prepare the Appeal Record). With regards to the fifth condition, this complaint was initially filed in 2008, and had been ongoing for eight years; the respondents, APEGA, deserved closure. As a combination of all these factors, the appeal was dismissed, and this marked the end of the case.

## THE COURT OF QUEEN'S BENCH DECISION

Following the ruling from the AHRC, APEGA appealed the tribunal's decision to the Court of the Queen's Bench of Alberta. Four main topics were discussed during this hearing: procedural fairness, jurisdiction, prima facie discrimination and justification.

Procedural fairness revolved around whether the tribunal breached the rules of fairness by raising issues that were not presented by either Mihaly or APEGA. The tribunal stated that APEGA's exams were not to correct any academic deficiencies, while APEGA argued that it was. APEGA said that the tribunal based their decisions on grounds not presented by either party; these included the tribunal citing prima facie discrimination, which was not justified under section 11 of the AHRA, and citing section 8 of the Engineering and Geoscience Professions General Regulation (EGPR) as the reasoning why prima facie discrimination was not justified. APEGA argued that they did not get a chance to prepare those issues and that this was a breach of fairness. However, in general, tribunals and courts are not required to give parties every law point they present in a case. Thus, it was found that the tribunal did not breach procedural fairness.

Jurisdiction aimed to investigate whether the tribunal had the jurisdiction to conclude that Mihaly's educational credentials were being discriminated, and whether this was a form of discrimination related to his place of origin. APEGA said that the tribunal did not have the jurisdiction to make this conclusion, since the AHRA does not protect discrimination based on where someone receives their education. They cited the *Grover v Alberta* case, in which Grover argued that discrimination based on education was indeed a form of discrimination based on place of origin, since place of origin does not strictly mean where one is born, but rather, "where you come from" [6]. When this complaint was brought to the Court, they responded by saying, "... 'place of origin of the person'. This degree of specificity prevents the broad interpretation... not for the courts to impose an artificial interpretation of words chosen by the Legislature... cannot be stretched to include the place where the person received their... degree" [6]. The tribunal argued that they did have the jurisdiction to make this statement by citing the *Bitoni v British Columbia* case. The tribunal argued that discrimination based on place of origin is more than where one is born, as in this case, after considering the place of medical training, country of birth and a College's licensing rules, the College was guilty of discriminating against foreign-educated medical students. Justice Ross concluded that in this case, the tribunal's presentation of the *Bitoni* case was more relevant. With Mihaly, there was a "clear linkage between Mr. Mihaly's place of origin, the origin of Mr. Mihaly's foreign credentials and whether he is granted admission to [APEGA]" [6]. However, Justice Ross explained that the jurisdictional issue is better resolved by determining whether the tribunal should have applied a legal test to determine whether Mihaly was facing prima facie discrimination. Therefore, it was concluded that APEGA did not succeed in establishing that the tribunal lacked jurisdiction.

In terms of prima facie discrimination, this section discusses whether the tribunal chose the right legal test, and whether they applied it correctly to prove that Mihaly did face prima facie discrimination. The *Moore v British Columbia* case set out the foundation for testing prima facie

discrimination. Within this test (referred to as the Moore test), there are three conditions that have to be met: 1) A person must have a characteristic that is protected from discrimination; 2) This person must have faced a difficulty; 3) The difficulty arose partly due to the characteristic that is protected from discrimination. Using the Moore test, which Judge Ross said was the appropriate test to use, the tribunal states that all three conditions were met. They said that Mihaly was discriminated because of where he obtained his education, which, as established above, was a proxy for place of origin (condition 1); Mihaly's difficulties included having to write the confirmatory and FE exams, spend time, money and resources to pass the exam (condition 2) and that he was having these difficulties because he was educated in a foreign country (condition 3). Also, since Mihaly had no option to avoid the exams (i.e. dodge the difficulty) and that there were barriers (e.g. language) that prevented him from performing the exams well, it showed that "...he came with his educational background, in the same way that he came with his culture and language" [6]. Thus, Justice Ross did agree that his place of origin did provide an adverse impact on him. In terms of whether his place of origin impacted the difficulties he faced with the NPPE and the 1 year of Canadian experience he had to obtain, Judge Ross concluded that these did not meet the conditions of prima facie discrimination, since the NPPE was required by everyone applying for their license (and Mihaly failing three times had nothing to do with where he came from); as well, Canadian engineering graduates were expected to obtain four years of experience before they could apply. Furthermore, Mihaly's difficulty with finding a job had no relation to his place of origin since he had experience for six years working in junior positions, and not necessarily, engineering positions.

Justification involves whether the tribunal's decision of whether APEGA's registration requirements were justified. As discussed above, since Mihaly was found to have faced prima facie discrimination for needing to write the confirmatory exams and the FE, these had to be justified under section 11 of the AHRA; since there was no prima facie discrimination for writing the NPPE and the one-year work experience in Canada, these did not need to be justified. The tribunal applied the correct test for justification, which involves the defendant to prove: 1) APEGA adopted the standard for a purpose or goal that is rationally connected to the function being performed; 2) The standard was adopted in good faith, in the belief that it is necessary for the fulfillment of the purpose or goal; 3) The standard is necessary to accomplish its purpose or goal, in the sense that the defendant cannot accommodate persons with the characteristics of the claimant without incurring undue hardship. The first two elements of this test were met, as APEGA's standards are to ensure the safety of the public and the competency of their engineers (condition 1), and that these measures are taken in good faith (condition 2). However, the tribunal claims that APEGA did not meet the third condition, as they did not accommodate Mihaly reasonably. In terms of the confirmatory exams, the tribunal found that this requirement to write the exams was not justified because Mihaly should be individually assessed, instead of writing a "one size fits all" [6] exam, since it does not account an "individual's background, specific training and experience" [6]. In terms of the exams, APEGA does these to ensure the competency of engineers; plus, it is important to note that the FE exam has a high pass rate from international graduates, and those who fail can retake the exam. In terms of individual assessment, APEGA does carry these out in special cases, such as if applicants have 10 years of progressively responsible engineering experience. The tribunal argued that having individualized training for 10 years is difficult for foreign engineers since they come early in their career. However, in this case, Mihaly came with more than 10 years of experience, and his experience

was assessed to be insufficient. With regards to a committee being formed to review and assess Mihaly's credentials, and Mihaly being matched with a mentor, this was viewed as taking up a lot of resources, which would cause undue hardship. In the Hydro-Quebec case, it was stated that "The employer does not have a duty to change working conditions in a fundamental way, but does have a duty, if it can do so without undue hardship..." [6]. Individual assessments would be costly and would not provide a standardized, equal evaluation for everyone. Furthermore, if this was implemented, it would change the role of APEGA from being a regulatory body. Although the tribunal found that Mihaly faced prima facie discrimination with regards to the confirmatory and FE exams, this was not justified. In fact, the Court stated the tribunal's "conclusion regarding accommodation falls outside the range of acceptable outcomes... and, as such was unreasonable" [6].

After taking all these factors into account, the Court of Queen's Bench reversed the decision of the tribunal.

## REFLECTION AND OPINION

The AHRC's tribunal finding APEGA discriminating against Mihaly by not awarding him his license is something we do not agree with; instead, we support the Court of Queen's Bench decision. APEGA did not award Mihaly his license because he did not complete the exams or experience required to prove he is a competent engineer. APEGA has done its best to accommodate several foreign engineers by setting up negotiations with MRA countries. Furthermore, note that the Court agreed that APEGA does not have the resources to set up these agreements with all countries or non-major engineering schools. Thus, for applicants from non-MRA countries, it is important for APEGA to evaluate these applicants in a fair and equal manner, such as through standardized tests. These standardized tests were made by "individuals at the University of Alberta and the University of Calgary... to cover the subject matter that APEGA would expect to see in someone who has graduated from a Canadian-accredited program" [6]. The tribunal requested to set up individualized assessments for all foreign applicants, but the problem with this is that since it is not standardized, it could result in various interpretations of whether someone is qualified to be an engineer (e.g. while someone says 10 years of experience is good enough, someone else might say that it is not "good" because it is not relevant experience), and thus, result in more discriminatory cases. Additionally, it also presents the issue that Canadian and MRA country graduates could say that they should also be given individualized assessments (if not, they could argue it is discriminatory). This excessive amount of individualized testing would cause APEGA undue hardship. Basing a person's engineering experience based on varied individual assessments is not proper for public safety, especially after the various engineering incidents that occurred in Canada, such as the Quebec Bridge Collapse that occurred twice and resulted in several deaths. Recall that the basis of engineering is protecting the public. The definition of engineering itself, as set out by Engineers Canada, involve protecting "life, health, property or public welfare", and an engineer is someone who is authorized to carry out safety tests, like determining the factor of safety. The Acts and associations revolve around this; the code of ethics directly states that "holding "paramount" public safety, health and welfare means that this takes precedence over all other considerations" [12]. Hence, if foreign engineers are given their license on individualized assessments that could



compromise public safety, it automatically violates the act, which forms the basis of regulating engineering within Canada. In terms of the Canadian work experience requirement, this is important as Mihaly needs to be aware of various factors that affect engineering in Canada (e.g. how climate affects engineering design); also note that engineering graduates are required extensive work experience as well that relate to the nature of the experience. Essentially, all of the current requirements APEGA has ensures the competency of engineers. Simply, ask yourself the following question to understand APEGA's point of view – do you want to cross a bridge knowing that, for sure, all the engineers have the same level of education and experience to build that bridge, or do you feel comfortable crossing this bridge knowing people having varying levels of education and experience (including some that may not have the proper experience at all) built the bridge?

Foreign trained engineers must be accommodated in Canada or else, this becomes a discriminatory problem on a larger scale, as it would breach major laws such as the Canadian Human Rights Act and Canada's Employment Equity Act, which protects the rights of foreign workers. Furthermore, this could result in problems from other self-regulated professions, such as medicine, law, nursing, dentistry, accounting, etc.; for example, foreign engineers could ask, "why can foreign medical doctors practice in Canada, but not foreign engineers?". Also, foreign trained engineers provide a source of great experience and knowledge. As a developed country, Canada wants the best engineers in order to ensure the security of the people. Various areas around the world, such as the US, Europe, etc. are hubs for new engineering ideas, and it is important that, should these engineers move to Canada, they are able to apply the knowledge they have (provided they are cleared to practice engineering in Canada). After reviewing this case, we believe that APEGA's current practices to license foreign engineers is fair and ensures competency. However, in order to accommodate foreign trained engineers better, a course should be offered by APEGA to brush up their skills and to familiarize themselves in Canadian environment and ethical rules and regulations before applicants have to write the exams required. Additionally, APEGA should consider lowering or getting rid of the fees associated with writing each exam; the APEGA website shows that the NPPE costs \$230 - \$330 in Canada, each technical exam costs \$250, and the application itself costs \$250 - \$500. APEGA could also consider reducing the cost of the application or exams for people who have to reapply and redo their exams if they failed. Furthermore, APEGA lists out various resources for applicants, such as relevant textbooks that can aid them with their studying, as well as practice exams, but these aids need to be free of cost so that for an foreign trained engineer, it is not too expensive to even get the licence.

## REFERENCES

[1] (2018). Retrieved from CanLII:  
<https://www.canlii.org/en/ab/abhrc/doc/2014/2014ahrc1/2014ahrc1.html?search>

[2] *Alberta Court of Queen's Bench Overturns Discrimination Decision on Foreign Trained Engineer*. (2018). Retrieved from University of Calgary- Faculty of Law:  
<https://ablawg.ca/2016/03/23/alberta-court-of-queens-bench-overtturns-discrimination-decision-on-foreign-trained-engineer/>

[3] *APEGA*. (2018). Retrieved from APEGA: <https://www.apega.ca/news/appeal-mihaly-decision-succeeds/>

[4] *APEGA's Appeal of Mihaly Decision Succeeds*. (n.d.). Retrieved from APEGA: <https://www.apega.ca/assets/news-releases/ahrc-appeal-decision.pdf>

[5] *Ladislav Mihaly Alberta Foreign Engineers* . (2018). Retrieved from cbc: <http://www.cbc.ca/news/canada/calgary/ladislav-mihaly-engineers-alberta-foreign-1.3933845>

[6] *Mihaly-decision*. (n.d.). Retrieved from APEGA: <http://www.apega.ca/assets/PDFs/mihaly-decision.pdf>

[7] *Licensee Applications*. (n.d.). Retrieved from APEGA: <https://www.apega.ca/apply/licensee/>

[8] *National Professional Practice Exam*. (n.d.). Retrieved from APEGA: <https://www.apega.ca/apply/exams/national-professional-practice-exam-nppe/>

[9] *Technical Exams*. (n.d.). Retrieved from APEGA: <https://www.apega.ca/apply/exams/technical/>

[10] *Professional Bodies, Internationally Educated Graduates and the Alberta Human Rights Act*. (2014). Retrieved from Retrieved from University of Calgary- Faculty of Law: <https://ablawg.ca/2014/03/17/professional-bodies-internationally-educated-graduates-and-the-alberta-human-rights-act/>

[11] *In the Court of Appeal of Alberta*. (2017). Retrieved from APEGA: <https://www.apega.ca/assets/news-releases/2017-milhaly-court-decision.pdf>

[12] *Guideline for Ethical Practice*. (2013). Retrieved from APEGA: <https://www.apega.ca/assets/PDFs/ethical-practice.pdf>