

Mihaly vs. APEGA

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1. INTRODUCTION

Mr. Mihaly immigrated to Alberta in 1999 as a foreign-educated engineer with 25 years of work experience [1]. After applying to The Association of Professional Engineers and Geoscientists of Alberta (APEGA) to become a licensed member, he was informed that he was required to write the compulsory ethics exam, and three additional technical exams to confirm his academic credentials [1]. Mr. Mihaly refused to write the additional technical exams and later filed a complaint with the Alberta Human Rights Commission (AHRC), alleging that APEGA had discriminated against him based on his place of origin. [1]. This case was first heard at the AHRC and its decision was later appealed at the Court of Queen's Bench [2]. The issue in this case is whether additional technical examinations imposed by regulatory bodies constitutes discrimination under the Alberta Human Rights Act.

This report summarizes the history of this case, and the course that it followed through the AHRC, Court of Queen's Bench, and the Alberta Court of Appeal. It also provides insight into APEGA's regulatory process, and the requirements to become a registered professional engineer.

2. STAKEHOLDERS

The following is a brief description of the stakeholders associated with this case. Several of them are directly involved in the litigation, such as: APEGA, Mr. Mihaly, the AHRC, and the Court of Queen's Bench. Other parties are stakeholders because the outcome of the case potentially impacts them.

2.1 Association of Professional Engineers and Geoscientists of Alberta (APEGA)

APEGA is an association that regulates the engineering and geoscience professions in Alberta, making them a major stakeholder in this issue [3]. As a regulatory body, one of APEGA's responsibilities is to monitor the licensing of foreign-educated engineers and assess the competency of its applicants [3]. For example, all applicants are required to write the mandatory ethics exam, also called the National Professional Practice Exam (NPPE) [3]. In the case of applicants with non-accredited degrees, they may also be required to write additional technical exams to ensure their credibility [3]. Other requirements for applicants seeking registration with APEGA include: being fluent in English and having at least 12 months of work experience in Canada [3]. Depending on the outcome of the case, APEGA could have been required to change the way that they evaluate and grant registration to foreign-educated engineers.

2.2 Mr. Ladislav Mihaly

In May 1999, Mr. Mihaly applied to APEGA for registration as a professional engineer, bringing with him 25 years [4] of experience as an Engineer in piping design and fabrication

[2]. He was educated in the former Czechoslovakia, however his country did not have a Mutual Recognition Agreement with Canada [5]. This meant that Canadian Associations wouldn't recognize an engineering degree received in Czechoslovakia as equivalent to a degree received in Canada [6]. Mihaly obtained a master's diploma from the Slovak University of Technology in Bratislava in 1975, and a Certificate in Corrosion Engineering from the Institute of Chemical Technology in Prague in 1981 [2]. After failing the NPPE three times and refusing the additional technical exams assigned to him by APEGA, Mihaly filed a complaint with the Alberta Human Rights Commission (AHRC) on the grounds of discrimination based on his place of origin [2].

Mihaly is a major stakeholder in this case. If Mihaly had won this case, he could have been granted registration as a professional engineer in Alberta and received financial compensation for any adverse impacts that occurred.

2.3 The Alberta Human Right's Commission (AHRC)

The AHRC is an independent commission created by the Government of Alberta that functions to protect Albertans from discrimination under the *Alberta Human Rights Act* ("AHRA") [7]. During each hearing, a tribunal receives submissions from each party, hears evidence under oath, and makes a final decision on whether the complaint has merit [8].

In February 2014, the AHRC heard Mr. Mihaly's complaint against APEGA, but its decision was later appealed [9]. Depending on the outcome of the appeal, the AHRC could lose some of its credibility and it could change the way that it handles future cases.

2.4 The Court of Queen's Bench

The Court of Queen's Bench conducts criminal matters, civil disputes, and judicial reviews of government and tribunal action in Alberta [10]. On December 12, 2004, the Court of Queen's Bench heard APEGA's appeal regarding the decision made by the AHRC [2]. The Court of Queen's Bench is a key stakeholder because they were directly involved in the outcome of the case, and their decision could set a strong precedent for future cases of discrimination with regards to foreign academic credentials and registration with an Association.

2.5 Other Foreign-Educated Engineers

Foreign-educated engineers make up a significant percentage of the engineering workplace in Alberta. According to the most recent statistic in 2011, APEGA had 13,200 registered International Engineering Graduates (IEGs) out of 40,621 total members, or 32.5% [11]. Foreign-educated engineers, specifically non-members with APEGA, are stakeholders in this case because the outcome could potentially influence their decision to apply for registration with APEGA. The context of this case could apply to many applicants in similar situations to Mr. Mihaly.

2.6 Other Self-Regulated Professions

There are many self-regulated professions in Alberta including: architects, physicians, nurses, lawyers, and teachers, among many [12]. Each of these occupations regulates the registration of internationally-educated applicants. These associations are stakeholders in this case because their registration policies could potentially change depending on the outcome. For example, if Mihaly succeeded in establishing discrimination by APEGA on the grounds of place of origin, other self-regulated professions with similar policies could be required to change their process to comply with the *AHRA*.

2.7 Countries without Mutual Recognition Agreements (MRAs)

Other foreign countries which don't have Mutual Recognition Agreements (MRAs) with Canada are also stakeholders in this case. Regardless of the outcome of this case, it is evident that establishing an MRA with Canada would streamline the process for licensing foreign-educated applicants. This case brought a lot of media attention and may have caught the interest of foreign countries without MRAs – especially Czechoslovakia, where Mr. Mihaly was educated [2].

3. BACKGROUND

3.1 Mihaly's Application to APEGA

On May 19, 1999, APEGA responded to Mihaly's application, requested a copy of his transcripts, and advised him of the NPPE [2]. After the APEGA Board of Examiners reviewed Mihaly's education and work experience, they advised him on February 11, 2000 that, in addition to writing the NPPE, he was also required to take a course in Engineering Economics and write three additional technical exams [2]. In 2006, the Fundamentals of Engineering (FE) exam was approved by APEGA as an alternative to their previously assigned technical exams. Mihaly was then given the option of writing the FE exam [1].

Mr. Mihaly failed the NPPE exam three times between June 1999 and January 2003 [2], and refused the additional technical exams [1]. In 2008, after several years of negotiation with APEGA, Mihaly filed a complaint with the AHRC alleging that APEGA had discriminated against him and denied him registration based on his place of origin [1].

3.2 Decision of the Alberta Human Rights Commission

In February 2014, Mihaly appeared against APEGA at the AHRC [2]. He claimed that the additional technical exams imposed on him were contrary to the *Alberta Human Rights Act RSA 2000 c A-25.5 ("AHRA")* [1]. Section 9 of the *AHRA* stated that "No...occupational association shall...exclude any person from membership in it...or discriminate against any person or member, because of...place of origin..." [13].

Evidence presented at the hearing indicated that foreign applicants with engineering degrees from countries without Mutual Recognition Agreements were assessed by APEGA's Examination Standard and Experience Standard [1]. Based on this assessment, applicants could be required to write additional technical exams, or the FE exam, to confirm their academic credentials [1]. In the case of a senior, exams could be waived if the applicant had 10 years of progressively responsible engineering experience or other evidence of engineering competence, such as a master's degree [3]. Despite working as an engineer for 25 years, APEGA assessed Mr. Mihaly's previous work experience as not "progressively responsible", and according to the Foreign Degree list, his master's degree was assessed as equivalent to a bachelor's degree [2].

At the AHRC, Mihaly succeeded in arguing that APEGA had discriminated against him based on his place of origin when they refused to recognize his education as equivalent to a Canadian degree, and by requiring him to write the additional technical exams [5]. The Tribunal at the AHRC recognized that the statutory framework of APEGA was intended to assess the competency of applicants, especially foreign-educated engineers who applied for registration [9]. However, the Tribunal found that APEGA failed to recognize the "serious difficulty" of meeting certain requirements that they imposed on applicants [9]. For that reason, the Tribunal decided that the Examination Standard and Experience Standard used by APEGA, without more individualized assessment or exploration of other options, constituted discrimination that couldn't be justified under the Alberta Human Rights Act [9]. Mr. Mihaly was awarded \$10,000 for injury to dignity [5], but was not compensated for loss of income [9].

3.3 Decision of the Court of Queen's Bench

APEGA filed an appeal to reverse the decision of the AHRC, and raised the following issues: procedural fairness, jurisdiction, *prima facie* discrimination, and justification [2]. The decision of the Court of Queen's Bench is described in greater detail below in section 4.

Regarding the first two issues, the Court of Queen's Bench, represented by the Honourable Madam Justice Ross, supported the actions of the AHRC [2]. Justice Ross decided that the AHRC did not breach the rules of procedural fairness, and that they had jurisdiction over the case [2]. Regarding the last two issues, Justice Ross addressed whether the Tribunal reasonably concluded *prima facie* discrimination, and whether the alleged discrimination was justified under the AHRA. *Prima facie* discrimination is where the plaintiff has sufficient evidence to prove that their employer, in this case APEGA, discriminated against them [14].

Justice Ross agreed with the Tribunal's finding of *prima facie* discrimination when APEGA required Mihaly to write three additional technical exams [2]. However, Justice Ross found no evidence of *prima facie* discrimination with regards to the NPPE or the one-year Canadian experience requirement; Justice Ross decided that the Tribunal's findings of *prima facie* discrimination regarding these requirements were unreasonable [2].

Although Justice Ross agreed with the AHRC that the additional technical exams were discriminatory by definition, according to the *AHRA*, contravention of the Act may be justified if determined to be reasonable and justifiable in the circumstances [13]. The Tribunal decided that APEGA's requirements could not be justified, however Justice Ross found the Tribunal's decision to be unreasonable [2]. Justice Ross concluded that the decision of the Tribunal should be reversed, and that there was no need to remit the matter back to the AHRC [2].

3.4 Decision of the Alberta Court of Appeal

On February 22, 2016, Mr. Mihaly filed an appeal, but failed to meet three of the requirements to properly restore it [15]. Specifically, he failed to perfect the appeal, order transcripts, and prepare the Appeal Record [15]. Therefore, the Alberta Court of Appeal dismissed Mihaly's application [15].

4. THE COURT OF QUEEN'S BENCH DECISION

APEGA sought to appeal the decision of the AHRC ("the Tribunal") and raised the following issues: (1) Procedural fairness, (2) Jurisdiction, (3) *Prima facie* discrimination, and (4) Justification [2].

4.1 Procedural Fairness

APEGA submitted that the Tribunal had breached the rules of procedural fairness by basing their decision on information that neither party advanced, and not allowing APEGA to address it [2]. Although Mr. Mihaly didn't advance the information, the Tribunal decided that the additional technical exams assigned to Mihaly were not "for the purpose of correcting a perceived deficiency" as intended in the *Engineering and Geoscience Professions General Regulation* ("EPGR") [2]. However, APEGA claimed that it was an incorrect interpretation of the EPGR [2].

Justice Ross concluded that while the Tribunal should have questioned the parties about the issue, failure to do so didn't constitute a breach of the rules of procedural fairness [2].

4.2 Jurisdiction

APEGA submitted that the Tribunal didn't have jurisdiction over the case because the *AHRA* didn't apply to discrimination based on place of education [2]. APEGA attempted to support this using the case of *Grover v Alberta Human Rights Commission*, 1999. In this case, the Alberta Court of Queen's Bench held that the *AHRA* did not protect against discrimination based on the "place of origin of academic qualifications" [2]. However, Justice Ross decided that the jurisdiction issue was more accurately determined by the legal test for *prima facie* discrimination, as set out in *Moore v British Columbia (Education)*, 2012 [13]. Justice Ross concluded that APEGA did not establish that the Tribunal lacked jurisdiction.

4.3 *Prima facie* discrimination

Under the *Moore* test, to establish *prima facie* discrimination, the complainant (Mihaly) must show that (1) they have a characteristic that is being protected from discrimination, (2) they experienced an adverse impact, and (3) the protected characteristic was a factor in the adverse impact [2]. Justice Ross determined that the issue wasn't the choice of the legal test, but its application; therefore, the reasonableness standard of review applied [2]. There wasn't any disagreement with the AHRC's findings on the first two criteria [13].

Regarding the additional technical exams assigned to Mr. Mihaly, Justice Ross found that Mihaly had no way of avoiding the adverse impact of having to write the exams, aside from receiving his education outside of his place of origin [2]. Therefore, Justice Ross concluded that Mihaly's place of origin was a factor in the adverse impact [2].

Regarding the NPPE, Justice Ross found no evidence that the requirement to pass the mandatory exam constituted discrimination [2]. Despite Mihaly failing the exam three times, there was no evidence to suggest that it was related to his place of origin [2]. Similarly, Justice Ross found no evidence of *prima facie* discrimination with regards to APEGA's one-year Canadian experience requirement [2]. As a result, Justice Ross concluded that the Tribunal had failed to reasonably apply the *Moore* test in relation to these requirements [2].

4.4 *Justification*

Section 11 of the *AHRA* states that contravention of the Act may be justified if determined to be reasonable and justifiable in the circumstances [13]. The Tribunal agreed that APEGA had a legal responsibility to ensure the competency of foreign-educated engineers in the registration process, however the issue was related to the Tribunal's finding that APEGA did not reasonably accommodate Mr. Mihaly [2]. Again, the standard of review was reasonableness [2].

At the AHRC, the Tribunal ordered APEGA to carry out several efforts including: matching Mr. Mihaly with a mentor with a similar background, reviewing Mihaly's transcript and experience in direct consultation with his former educational institutions, and forming a committee to find ways to correct any of Mihaly's deficiencies [1]. Justice Ross found that those directions went "beyond the scope of any discriminatory conduct found", and that the Tribunal failed to consider the impact of cost that it would have on APEGA [2].

With all things considered, Justice Ross concluded that the Tribunal's decision that APEGA had failed to accommodate Mr. Mihaly was unreasonable [2]. Justice Ross found that the Tribunal's decision was "rife with logical errors, findings of facts that [were] unsupported by the evidence, and [had] failed to take into account relevant considerations" [2].

In APEGA's Notice of Appeal, they sought to reverse the decision of the Tribunal [2]. Justice Ross concluded that the decision should be reversed, and that there was no need to remit the matter back to the AHRC [2].

5. REFLECTION AND OPINION

5.1 Opinion on the Decision of the Alberta Human Rights Commission

In my opinion, the decision of the Alberta Human Rights Commission regarding the discrimination of Mr. Mihaly was incorrect. I disagree with their finding that APEGA's assessment and requirements for Mr. Mihaly could not be justified under the *AHRA* without more individualized assessment. APEGA's policy is designed to accommodate many different situations, and I think that it strikes a balance between the need to ensure individual competency and the need for individualized assessment. APEGA's policy for applicants with non-accredited degrees is to perform a detailed evaluation of each applicant's transcript and assign additional technical exams (based on the Engineering Canada syllabus) to confirm their academic credentials [3]. By assigning these technical exams, I believe that APEGA is performing their due diligence to ensure the capability of each licensed engineer in Alberta.

I also disagree with the six remedies that the Tribunal ordered APEGA to comply with. Some of these included establishing a committee to assess Mr. Mihaly's academic qualifications, matching Mihaly with a mentor, and reviewing his transcript in direct consultation with his former educational institutions. In fairness to the AHRC, the decision by the Tribunal did not take away any power from APEGA and they did not order APEGA to give Mr. Mihaly PEng status. However, their requirements failed to consider the significant extra costs that APEGA would incur. In my opinion, the AHRC was ordering APEGA to act outside of its regulatory role and it would simply not be possible for APEGA to accommodate every foreign-educated applicant in the same manner.

5.2 Opinion on the Decision of the Court of Queen's Bench

I fully support the decision of the Court of Queen's Bench and agree with Justice Ross' conclusion that the decision of the AHRC should be reversed. I think that Justice Ross addressed the legal failings of the Tribunal's analysis appropriately, and carefully considered the precedent that this case would set for other self-regulated professions.

Regardless of whether APEGA's policies are found to be discriminatory, I believe that they are justified when used to confirm the competency of their applicants. If the standards used to verify an individual's education and experience credentials were lowered, I believe that it would result in an unjustified increased risk to public safety. The standards for professional engineers in Alberta are very high, and the process for licensing engineers should maintain that same standard.

5.3 Opinion on the Decision of the Alberta Court of Appeal

In my opinion, the Alberta Court of Appeal made the correct decision in dismissing Mr. Mihaly's application. While I support the decision of the Court of Queen's Bench and feel that Mihaly's appeal had little merit, the simple matter of fact was that Mihaly failed to comply with the criteria for restoring his appeal. This alone was justification for dismissing his application.

5.4 Should APEGA accommodate foreign-trained engineers and geoscientists?

Without a doubt, we should be accommodating foreign-trained engineers and geoscientists. As described earlier in the report, internationally educated engineers make up over 32% of the licensed engineers in Alberta [11]. I believe that accommodating foreign-trained engineers promotes our Canadian value of diversity in a positive way and brings valuable knowledge and experience from around the world to the industries in Alberta/Canada.

5.5 How should APEGA accommodate foreign-trained engineers and geoscientists?

APEGA can accommodate foreign-educated engineers and geoscientists by collaborating with international education institutions and establishing Mutual Recognition Agreements. This would promote the value of foreign professionals in Canada and streamline the process for licensing internationally educated applicants. Another way APEGA can accommodate foreign-educated applicants is to provide more support for applicants who don't speak English fluently. For example, APEGA could provide supplementary English language courses, English tutors, or additional reading and writing materials specific to engineering and geoscience professions. Finally, APEGA could consult currently licensed foreign-educated engineers and geoscientists to gain valuable input into creating a better program for international applicants.

In conclusion, although the Court of Queen's Bench found that APEGA had not discriminated against Mr. Mihaly based on his place of origin, this case shined a light on the challenges that foreign-educated engineers face when seeking registration in Alberta. Without a doubt, APEGA should certainly accommodate foreign-educated applicants and seek to provide them more support. This would allow foreign-educated applicants to have an easier transition into the workplace, and thereby strengthen the diversity of professional engineers and geoscientists in Alberta.

6. REFERENCES

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