

APEGA v Mr. Ladislav Mihaly

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Introduction

This report studies the decision of The Court of Queen's Bench of Alberta in the matter involving the Association of Professional Engineers and Geoscientists of Alberta [APEGA], the Human Rights Commission of Alberta, and Mr. Ladislav Mihaly. The Court of Queen's Bench of Alberta investigated appeals from both APEGA and Mr. Mihaly in response to the Human Rights Commission's decision that APEGA had discriminated against Mr. Mihaly based on his place of origin. Mr. Mihaly claimed that due to this discrimination, he was unable to register in Alberta as a Professional Engineer. The purpose of this report is to gain a greater understanding of the requirements to become a registered professional engineer in Alberta. Additionally, this report should give a greater insight into APEGA's regulatory process and the legal environment in which it operates.

Stakeholders

A stakeholder is any person or organization that has an interest in an organization, and may be affected by the actions of that organization. The list below outlines the main stakeholders in this case:

1. APEGA: As a regulatory body, APEGA ensures that professional engineers have the requisite competencies and skills to adequately serve the public as a licensed engineer. APEGA administers qualification exams to foreign applicants to assess whether their abilities meet APEGA standards. In this case, the applicant Mr. Mihaly, was unsuccessful in proving his competency to APEGA's satisfaction, and therefore was denied licensing by APEGA. APEGA appealed the judgement of the Alberta Human Rights Commission, which found that APEGA discriminated against Mr. Mihaly based on his place of origin.
2. The Court of Queen's Bench: The Court of Queen's Bench of Alberta is the trial court for the Province of Alberta, which deals with civil and criminal matters (Court of Appeal of Alberta, (n.d.)). Both APEGA and Mr. Mihaly appealed the decision of the Alberta Human Rights Commission to the Court of Queen's Bench in their role as resolver of civil disputes.
3. The Alberta Human Rights Commission: The role of the Alberta Human Rights Commission [The Commission] is to protect Albertans from discrimination in certain areas based on specified grounds (Alberta Human Rights Commission, (October 24, 2012)). The Commission responded to a complaint made by Mr. Ladislav Mihaly, who asserted that he was being discriminated against on the basis of his place of origin. The investigation carried out by The Commission found APEGA's foreign entrance policies to be based on discrimination of a protected characteristic.

4. Mr. Ladislav Mihaly: The engineer educated and certified in the former Czechoslovakia. Mr. Mihaly applied to APEGA for registration as a professional engineer in the province of Alberta. Mr. Mihaly failed the National Professional Practice Exam twice and failed to show up for a re-write of the exam. He filed a complaint with the Alberta Human Rights Commission stating that APEGA had discriminated against him based on his place of origin by not recognizing his education as equivalent, and by making him write confirmatory examinations to be a professional engineer. Unhappy with the Alberta Human Rights Commission decision, he further appealed his situation to the Court of Queen's Bench of Alberta.
5. Canadian Engineering Accreditation Board (CEAB): The CEAB assesses qualifications of engineers within Canada as well engineering programs outside of Canada. Additionally, the CEAB negotiates Mutual Recognition Agreements (MRAs) with other countries. These agreements determine if the accreditation process in other countries is equivalent to the Canadian accreditation process. If an MRA is present between a foreign country and Canada, graduates of accredited programs from these foreign countries are not assigned examinations by APEGA. The CEAB has indicated that there is no MRA between Slovakia and Canada, and Slovakia has never applied to go through this process.
6. The Court of Appeal of Alberta: The Court of Appeal of Alberta hears criminal and civil appeals from the Court of Queen's Bench. In the Court of Appeal, cases are not re-tried, they are only reviewed in order to determine if errors were made in the original decision. Mr. Mihaly appealed the decision from the Court of Queen's Bench to the Court of Appeal; however, his appeal was struck off as he failed to submit the necessary requirements within the outlined timeframe.
7. Citizens of the Province of Alberta: The citizens of Alberta put their trust in APEGA every day, for them to properly regulate the professions of engineering and geoscience to ensure a safe society for everyone. If Mr. Mihaly had been registered as a professional engineer without meeting the necessary requirements as set out by APEGA, the citizens of Alberta may have been in danger if Mr. Mihaly were to act as an engineer without the proper qualifications and competencies.

Background

Mr. Mihaly, an engineer born and educated in Czechoslovakia, first applied to APEGA in 1999 for registration as a professional engineer. After reviewing his application, APEGA advised Mr Mihaly that he would be required to write the National Professional Practice Exam. Mr. Mihaly failed his first attempt at the exam, and did not show up to re-write the exam. As he had failed to successfully complete

the necessary exams within the required time period initially set out by APEGA, APEGA withdrew his application for registration as a professional engineer. Over the course of seven years, Mr. Mihaly's application to register as a professional engineer in Alberta was terminated three times because of his failure to meet the requirements of the application process. After having his application reinstated for the fourth time, Mr. Mihaly filed a complaint with the Alberta Human Rights Commission in accordance with the Alberta Human Rights Act. Mr. Mihaly claimed that by denying him registration as a Professional Engineer, APEGA had discriminated against him based on his place of origin.

The Alberta Human Rights Commission [The Commission] found that "Mr. Mihaly has succeeded in establishing that the *Examination Standard* and the *Experience Standard* used by [APEGA] to assess his education credentials, without more individualized assessment or exploration of other options, constitutes discrimination which cannot be justified under the [Ahra]" (Ross, J.M. (January 26, 2016)). The Commission came to this conclusion partly by examining the requirements of a *prima facie* case of discrimination. To establish a *prima facie* case, complainants are required to prove three things:

1. They have a characteristic protected from discrimination under the Code,
2. They experienced an adverse impact with respect to the service,
3. The protected characteristic was a factor in the adverse impact.

The Commission determined that Mr. Mihaly's place of origin is a protected characteristic under the Alberta Human Rights Act and that he was being treated differently due to being a foreign graduate. Additionally, The Commission found that Mr. Mihaly had been adversely impacted through the registration process by being required to write numerous confirmatory exams in order to prove his competency. Finally, it was clear that Mr. Mihaly's protected characteristic was the main factor in the adverse impact he experienced. Therefore, The Commission found "...[Mr. Mihaly] has established a *prima facie* case that APEGGA discriminated against him in the area of services and membership in an occupational association, on the ground of place of origin" (Jiwaji, M. (February 6, 2014)). When a *prima facie* case of discrimination is confirmed, the respondent [APEGA] has an opportunity to justify the conduct. APEGA's justification was that the main objective of APEGA is to regulate the engineering profession with appropriate standards and practices. These standards are "explicitly required under the *Engineering and Geoscience Professions Act* which requires Internationally Educated Graduates to demonstrate that their qualifications are equivalent to Canadian graduates" (Jiwaji, M. (February 6, 2014)). The Commission found that APEGA's discrimination was unjustifiable under the act.

The Commission awarded Mr. Mihaly \$10,000 in damages and ordered APEGA to reconsider Mr. Mihaly's application. Furthermore, APEGA was ordered to provide individualized support for Mr. Mihaly, provide examination exemptions or different methods of assessment, and match Mr. Mihaly with a mentor to assist him with integrating into the engineering profession. As this order required APEGA to act outside of its role as a regulatory body, they appealed the findings of the Human

Rights Commission. The final judgement from The Commission was also cross-appealed by Mr. Mihaly.

The appeal was sent to The Court of Queen's Bench of Alberta. APEGA appealed against the decision of the The Commission, which stated that they had discriminated against Mr. Mihaly based on his place of origin. APEGA stated that "the Tribunal had no jurisdiction over Mr. Mihaly's complaint because the AHRA does not protect against discrimination based upon the 'place of origin of academic qualifications'" (Ross, J.M. (January 26, 2016)). Mr. Mihaly cross-appealed the judgment from The Commission as they refused to award him damages for loss of income. The Court of Queen's Bench supported APEGA's position and concluded that the judgement made by the Alberta Human Rights Commission should be reversed.

Mr. Mihaly further appealed the decision reached by The Court of Queen's Bench to the Alberta Court of Appeal. Mr. Mihaly based his appeal on the claim that The Court of Queen's Bench did not allow him to file certain materials that would have supported his application. Additionally, he argued that since APEGA presented a *Foreign Degree List* from 2010, it was unfair, as his assessment should have occurred from 2000 to 2006. However, after Mr. Mihaly filed the appeal, he took no further actions and the appeal was struck off. Six months later, he applied to restore his original appeal to the Court of Appeal. As Mr. Mihaly did not meet the several factors necessary to re-instate the appeal, the Court of Appeal concluded that the application of the appeal would not be restored, and the application was dismissed.

The Court of Queen's Bench Decision

Once the Human Rights Commission Tribunal [The Tribunal] concluded its process, APEGA decided to appeal the findings to the Court of Queen's Bench. Additionally, Mr. Mihaly cross-appealed the Tribunal's final decision, as they declined to award him any lost wages. Initially, the Court of Queen's Bench considered APEGA's legislative framework. The framework states that to be registered as a professional engineer in Alberta, the applicant must have knowledge of the *Engineering and Geosciences Professions Act*, and have good knowledge of the practice of engineering, as demonstrated by passing an exam prescribed by the Board of Examiners (Ross, J.M. (January 26, 2016)). Furthermore, the Court of Queen's Bench contemplated the three witnesses that gave evidence before The Commission in regards to APEGA's registration process and the process of accrediting engineering programs outside of Canada.

In APEGA's appeal, the issues laid out in paragraph 54 of the Court of Queen's Bench: *Association of Professional Engineers and Geoscientists of Alberta v Mihaly*, 2016 ABQB 61 were raised. These issues were whether the Tribunal was fair procedurally, if the Tribunal overstepped its jurisdiction, whether the Tribunal applied the correct legal test in determining discrimination, and whether the Tribunal's final decision was unreasonable or not.

In regards to procedural fairness, the Court of Queen's Bench followed the precedent established in *Pope and Talbot Ltd v British Columbia*, and found that the Tribunal's conduct did not breach rules of procedural fairness.

When considering APEGA's argument that the Tribunal overstepped its jurisdiction in determining whether discrimination was based on the place of origin, the Court of Queen's Bench considered the case of *Moore v British Columbia (Education)*. APEGA argued that the *Moore* test consists of arbitrariness and stereotypical thinking when determining *prima facie* discrimination. However, the Court stated that when interpreted correctly, the case of *Moore v British Columbia* establishes that the Tribunal had jurisdiction to determine whether Mr. Mihaly had successfully proved a *prima facie* case of discrimination. Therefore, the Court concluded that the Tribunal had acted within its jurisdiction.

APEGA's third issue raised was in regard to if The Tribunal applied the correct legal test when determining *prima facie* discrimination or not. APEGA argued that using the *Moore* test to determine *prima facie* discrimination was not comprehensive and did not require the complainant to demonstrate that the adverse impact was based on arbitrary or stereotypical treatment. In response, the Court stated "Arbitrariness and stereotyping are relevant but not required elements in assessing the connection between a ground of discrimination and an adverse impact" (Ross, J.M. (January 26, 2016)). Furthermore, APEGA argued that Mr. Mihaly could not accurately establish an adverse impact, as required from *prima facie* discrimination, as he had never written the necessary exams. However, the Court believed that it was fair for the Tribunal to conclude that the exams Mr. Mihaly was required to write could be seen as an adverse impact. Altogether, the Court of Queen's Bench found that the Tribunal used the correct and most applicable test in determining *prima facie* discrimination.

Finally, the last issue raised by APEGA questioned if the Tribunal's judgement that APEGA's registration processes were unjustified was reasonable or not. The Tribunal found that the Fundamentals of Engineering exam was unreasonable since it is a standardized test. The Tribunal came to this conclusion through studying and comparing the *Meiorin* case. However, the Court disagrees with the use of the *Meiorin* case to support the unreasonableness of the Fundamentals of Engineering exam. Moreover, the Court of Queen's Bench sided with APEGA's argument that internationally educated engineering graduates should have no difficulty passing the Fundamentals of Engineering exam. The issue of individualized assessment also arose when considering the justification of APEGA's registration requirements. It was found that APEGA does individually assess applicants in order to determine if they must write confirmatory examinations or not. Mr. Mihaly did not meet the requirements to have these examinations waived. The Tribunal argued that the individualized assessment carried out by APEGA was "on very narrow grounds" (Jiwaji, M. (February 6, 2014)). The Court found that this argument was contradictory to the evidence available regarding the assessment and registration of internationally educated graduates, and disagreed with the Tribunal's judgement.

In conclusion, the Court of Queen's Bench found that although the Tribunal had confirmed *prima facie* discrimination, their conclusion that APEGA was unable to justify their registration requirements was unreasonable and based on little evidence. The Court sided with APEGA and concluded that the decision made by the Alberta Human Rights Commission should be reversed.

Reflection and Opinion

APEGA has registration standards that candidates must meet in order to obtain professional registration. For APEGA to act in accordance with its mandate, which is to regulate the engineering and geoscience professions in order to protect the public, it must ensure that applicants comply with these standards before granting a professional designation. Mr. Mihaly did not meet the required standards and was not satisfied with APEGA's assessment of his qualifications. He decided to challenge APEGA's assessment first through the Alberta Human Rights Commission and then through the courts.

The Alberta Human Rights Commission found that APEGA had discriminated against Mr. Mihaly based on his place of origin, and ordered APEGA to reconsider his application to become a registered professional engineer. I believe that the finding of the Alberta Human Rights Commission was in error, as they stated that Mr. Mihaly had faced an adverse impact because of his place of origin when he had to write examinations to register as a professional engineer. As outlined in the *Engineering and Geoscience Professions Act*, to be registered as a professional engineer, the applicant must prove sufficient knowledge of the professions through passing exams prescribed by the Board of Examiners. Furthermore, academic qualification must be demonstrated. This may be in form of graduation from an accredited university program, or, if the applicant did not attend an accredited institution, academic qualification may be demonstrated by registering as an "examination candidate," and writing required examinations. As these necessary requirements for registration are outlined in APEGA's legislative framework, it is clear that APEGA was not discriminating against Mr. Mihaly based on his place of origin: they were simply upholding the registration requirements as outlined in the *Engineering and Geoscience Professions Act*.

Both APEGA and Mr. Mihaly appealed the judgement laid out by the Alberta Human Rights Commission. The appeal was sent to the Court of Queen's Bench of Alberta, where it was decided that The Commission's final judgement was not to be upheld, as it was "rife with logical errors, findings of fact that are not supported by the evidence, and failures to take into account relevant considerations" (Ross, J.M. (January 26, 2016)). I agree with the decision from the Court of Queen's Bench. I believe that the Commission based its final judgment on an inaccurate interpretation of the *Engineering and Geoscience Professions Act*, and did not produce enough accurate evidence to support its findings. Furthermore, the Court of Queen's Bench agreed with The Commission in regards to the fact that Mr. Mihaly was successful in establishing *prima facie* discrimination, but they did not agree with the claim that APEGA was unable to justify their registration requirements. I do not agree with the Court's statement that *prima facie* discrimination was present, as APEGA's legislative framework clearly lays out the fact that applicants must prove their competency and academic qualification through examinations. This requirement was not applied only to Mr. Mihaly because of his place of origin, but it was applied to the majority of internationally educated graduates to ensure APEGA was successful in regulating the engineering and geoscience professions. On the

other hand, I do agree with the Court's judgement that The Commission was wrong in claiming APEGA was unjustified in its registration requirements.

Mr. Mihaly further appealed this case to the Court of Appeal of Alberta, as he was unhappy with the outcome from The Court of Queen's Bench. However, Mr. Mihaly failed to follow up with his appeal, and the appeal was struck off. The Court of Appeal did not allow Mr. Mihaly to reinstate his application and the application was therefore dismissed. I believe that this was the right action as by this point in time, this matter had been before the courts for sixteen years, and Mr. Mihaly had continuously failed to respond to matters within a reasonable time frame.

I believe that the way APEGA currently deals with internationally trained engineers is sufficient. I do not think it is reasonable for them to overstep their bounds as a regulatory body and provide continuous mentorship and support to foreign graduates as requested by the Alberta Human Rights Commission. By assessing an applicant's individual education and work experiences, APEGA is able to administer different examinations as appropriate for each individual, or waive the examinations all together. This is a fair way to assess applicants, as it takes into account their different backgrounds and experiences. Additionally, this allows APEGA to continue to successfully regulate the profession in Alberta and ensure all professionally registered engineers and geoscientists are competent.

In conclusion, I believe the process of the case of APEGA v Mr. Ladislav Mihaly through the courts was well conducted. It allowed all participants to fairly argue their beliefs, while still terminating in a verdict that I believe is fair and reasonable. If this case had concluded at the final decision from the Human Rights Commission, APEGA's ability to regulate the professions would have been impaired, as an engineer who could not meet APEGA's standards may have been allowed to register as a professional engineer. That decision was appropriately overturned by due process, and a suitable outcome was realized.

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