

Mihaly & APEGA Report
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Introduction

The case between Ladislav Mihaly and APEGA is an important case for the expectations of APEGA when accommodating to foreign trained engineers applying for the professional designation in Alberta. The purpose of this report is to analyze how this case progressed from the first application to the Alberta Court of Appeals decision. It will also look at the requirements of applicants to become professional engineer in Alberta and how APEGA assesses applicants. This report will begin with an overview of the key stakeholders that are associated with the decisions, and then will move onto summarizing the history of the case and the decisions made by the Court of Queen's Bench, Alberta Human Rights Commission and the Alberta Court of Appeal. Then deeper look into the Court of Queen's Bench Decision will be given followed by a personal opinion on the progression of the case.

Stakeholders

APEGA

The Association of Professional Engineers and Geoscientists of Alberta (APEGA) appealed the 2014 court ruling in which Mr. Mihaly was awarded with \$10,000 and APEGA was required to amend their selection process to a more individual level (*Mihaly v. The Association of Professional Engineers, Geologists and Geophysicists of Alberta*, 2014 AHRC 1 at para 247, 249). APEGA regulates the practices of engineering and geoscience in Alberta ("About APEGA," n.d. para. 1). APEGA outlines the process by which a person is qualified to do engineering work within the province. The primary goal of APEGA is to ensure public safety and health by setting standards, developing codes, and licensing only qualified engineers.

The Court of Queen's Bench

The Court of Queen's Bench is the court in which the *Association of Professional Engineers and Geoscientists of Alberta b Mihaly*, 2016 ABQB 61 case was carried out. The Court of Queen's Bench was constituted by the Court of Queen's Bench Act ("About Court of Queen's Bench," n.d., para. 6). The Court of Queen's Bench has the responsibility and obligation to see that justice and rule of law is carried out. The court deals with criminal matters, civil proceedings and judicial review of government action in Alberta. In this case The Court of Queen's Bench is appealed by APEGA to conduct a judicial review of The Alberta Human Rights Commission's decision on the *Mihaly v. The Association of Professional Engineers, Geologists and Geophysicists of Alberta*, 2014 AHRC case and cross appealed by Mr. Ladislav Mihaly to receive \$1,000,000 or \$2,000,000 for lost wages.

The Alberta Human Rights Commission

The Alberta Human Rights Commission carried out the *Mihaly v. The Association of Professional Engineers, Geologists and Geophysicists of Alberta*, 2014 AHRC case in which it decided that Mr. Ladislav Mihaly is awarded \$10,000 in general damages and APEGA is to take extra steps in assisting Mr. Mihaly and to establish a committee to individually analyze foreign trained engineers. (*Mihaly v. The Association of Professional Engineers, Geologists and Geophysicists of Alberta*, 2014 AHRC 1 at paras 247, 249). The Alberta Human Rights was created by the Government of Alberta based on the Alberta Human Rights Act. The purpose of the Alberta Human Rights Act is to offer all Albertans an equal opportunity to "earn a living,

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find a place to live, and enjoy services customarily available to the public without discrimination” (“About the commission,” 2012, para. 1).

Mr. Ladislav Mihaly

Mr. Ladislav Mihaly was born and educated in Czechoslovakia and received two Master degrees, one from the Slovak University of Technology in Bratislava and another from the Institute of Chemical Technology in Prague (Mihaly v. The Association of Professional Engineers, Geologists and Geophysicists of Alberta, 2014 AHRC 1 at para 3). Mihaly, upon his arrival to Alberta, felt he had been discriminated against as he was required to write three confirmatory exams to ensure competence in the field of engineering. He was also required to have one year of Canadian engineering experience. In most cases, however, confirmatory exams and the requirement of one year Canadian experience is waived when a foreign applicant has ten years of experience and is from an institution on the FD list. Though Mihaly had ten years’ experience working in Czechoslovakia, his experience was not recognized so he was required to write the examinations and get one year of Canadian experience (Mihaly v. The Association of Professional Engineers, Geologists and Geophysicists of Alberta, 2014 AHRC 1 at para 22). As such, Mihaly pursued legal action through the Alberta Human Rights Commission on the grounds of discrimination and won \$10,000 (Mihaly v. The Association of Professional Engineers, Geologists and Geophysicists of Alberta, 2014 AHRC 1 at para 247). In 2016, the APEGA pursued legal action against the Alberta Human Rights Commission at the Court of Queen’s Bench, where Mihaly acted as the respondent and cross-appealer, seeking reparation payments of \$1,000,000 with registration with APEGA or \$2,000,000 if not registered as a professional engineer with APEGA (Association of Professional Engineers and Geoscientists of Alberta V Mihaly, 2016 ABQB 61 at para. 2).

Association of Professional Engineers and Geoscientists of Alberta v. Mihaly, 2016 ABQB 61

CEAB

The Canadian Engineering Accreditation Board (CEAB) assesses qualifications of engineers within Canada and assesses engineering programs outside Canada. If another country has an acceptable accreditation process to Canada they make a recommendation to Engineers Canada to enter a Mutual Recognition Agreement (MRA). (Mihaly v. The Association of Professional Engineers, Geologists and Geophysicists of Alberta, 2014 AHRC 1 at para 72). Since Czechoslovakia is not in a MRA with Canada, immigrants from Czechoslovakia have to either pass three confirmatory exams or the Fundamentals of Engineering exam in addition to the NPPE. If Mr. Mihaly won the case the CEAB would likely have to reevaluate their methods.

CEQB

The Canadian Engineering Qualifications Board (CEQB) uses open information resources to prepare the Foreign Degree (FD) list. The FD list is used to recognize institutions that Canada has not entered into an MRA with. (Mihaly v. The Association of Professional Engineers, Geologists and Geophysicists of Alberta, 2014 AHRC 1 at para 93). APEGA slightly favors applicants with an education from an institution on the FD list than applicants who are from an institution that are not on the list. Applicants who are on the list only have to write three confirmatory exams while applicants from institutions not on the list would have to write nine

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confirmatory exams or the FE exam. In both cases applicants have the option to only write the FE exam because APEGA deems it to be a very accurate method of assessing an individual's education. If Mr. Mihaly won this case APEGA would likely have to spend man power to do more research and communications with the thousands of institutions on the FD list.

FEQC

The Foreign Engineering Qualifications Committee (FEQC) is responsible for updating and maintaining the FD list. (Mihaly v. The Association of Professional Engineers, Geologists and Geophysicists of Alberta, 2014 AHRC 1 at para 121). If Mr. Mihaly won the case APEGA would have to play a much more hands on role in determining the individuals' academic background by doing further research and communications with institutions on the list. This would devalue the FEQC's purpose.

Background

APEGA, which regulates the practice of engineering and geoscience in Alberta, has a several step process by which engineers apply for licensing in Canada (APEGA, 2016, p. 6) The first step to be completed is to research and prepare the documents needed before submitting an application, after which the individual can submit their application (APEGA, 2016, p.10). The application requires contact information, proof of citizenship and residency, work experience, post-secondary education, as well as a declaration of character and English language competency (ELC) (APEGA, 2016, p. 26-70). The applicant must also take a National Professional Practice Exam (NPPE) (APEGA, 2016, p.71-74). After completing each step, APEGA reviews the application for the completion of the academic requirements and experience requirements (i.e. a minimum of four years of experience, including one year of acceptable referenced Canadian equivalent experience, which can be gained during or after the application and review process) (APEGA, 2016, p. 85). APEGA will also review the application for references that acknowledge the applicant as good in character and reputation (APEA, 2016, p. 85). Additionally, APEGA will look for the completion of ELC, successful completion of the NPPE, and documentation of permanent residence status in Canada or Canadian Citizenship (APEGA, 2016, p. 85).

Ladislav Mihaly began the application process with APEGA in May 1999, describing his qualifications from the Slovak Technical University in Bratislava and the Institute of Chemical Technology in Prague (Mihaly v. The Association of Professional Engineers, Geologists and Geophysicists of Alberta, 2014 AHRC 1 at para. 5-6). Mihaly also provided the names of three references who he had worked for (Mihaly v. The Association of Professional Engineers, Geologists and Geophysicists of Alberta, 2014 AHRC 1 at para. 7). His application was acknowledged by APEGA in May of the same year and a request was made that Mihaly provide transcripts, visa, and Landed Immigration form (Mihaly v. The Association of Professional Engineers, Geologists and Geophysicists of Alberta, 2014 AHRC 1 at para. 8). In January 2000, the Board of Examiners found Mihaly's transcripts, reference questionnaires, experiences, and references to be insufficient and Mihaly was advised, in February 2000, that, in addition to passing the NPPE, he must complete three confirmatory examinations and take a course or pass an equivalent exam in Engineering Economics by May 2001 (Mihaly v. The Association of Professional Engineers, Geologists and Geophysicists of Alberta, 2014 AHRC 1 at 9-10). In 2001, after Mihaly failed to pass the first NPPE in 2000 and failed to write the NPPP for a second time later that year, Mihaly was advised that his application had been withdrawn (Mihaly

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v. The Association of Professional Engineers, Geologists and Geophysicists of Alberta, 2014 AHRC 1 at para 11-13). In 2002 Mihaly asked APEGA to reactivate his application for registration, when he failed his NPPE in 2002 and failed to write the required confirmatory examinations, his application was once again withdrawn by APEGA (Mihaly v. The Association of Professional Engineers, Geologists and Geophysicists of Alberta, 2014 AHRC 1 at paras 14-25). In 2006, Mihaly asked APEGA to reactivate his application for a third time (Mihaly v. The Association of Professional Engineers, Geologists and Geophysicists of Alberta, 2014 AHRC 1 at para.26). Once again, Mihaly did not write the required examinations, and in 2008 he filed a complaint with the Alberta Human Rights Commission (Mihaly v. The Association of Professional Engineers, Geologists and Geophysicists of Alberta, 2014 AHRC 1 at para. 29). The Alberta Human Rights Commission Tribunal found Mr. Mihaly had succeeded in establishing that the *Examination Standard* and the *Experience Standard* that was used to assess Mihaly's education credentials, without a more individualized assessment or exploration of other options, constituted discrimination under the Alberta Human Rights Act (Mihaly v. The Association of Professional Engineers, Geologists and Geophysicists of Alberta, 2014 AHRC 1 at para. 242) and he was awarded \$10,000 for general damages (para. 247). In response to this ruling, APEGA registered an appeal on February 6, 2014 to the Court of Queen's Bench. Mr. Mihaly decided to cross-appeal APEGA's appeal in search of lost wages. Ultimately the Court of Queen's Bench ruled that the decision made by the Alberta Human Rights commission is to be reversed. Mr. Mihaly failed to deliver a finding of *prima facie* discrimination under s 11 of the AHRA, so his cross-appeal was dismissed. (Association of Professional Engineers and Geoscientists of Alberta V Mihaly, 2016 ABQB 61 at para. 154).

After The Court of Queen's Bench Decision Mr. Mihaly filed an appeal to the Court of Appeal of Alberta on February 22, 2016. Mr. Mihaly failed to submit the Appeal Record in time, so the appeal was dismissed on June 23, 2016. On December 15, 2016 Mr. Mihaly submitted an application to restore the appeal; however the restoration for appeal was dismissed on January 12, 2017. (Mihaly v. The Association of Professional Engineers, and Geoscientists of Alberta, 2017 ABCA 15 at paras 3, 10).

The Court of Queen's Bench Decision

The Court of Queen's Bench was asked to look at the decision of the Alberta Human Rights Commission Tribunal as APEGA and Mr. Mihaly had appealed its decision. The Tribunal had ordered APEGA to reconsider Mr. Mihaly's application and laid out several new steps that APEGA should use when assessing Mr. Mihaly's case. These steps will be discussed later. Mr. Mihaly was cross-appealing for \$1,000,000 for lost wages that were not awarded in the Tribunals Decision. The Court of Queen's Bench reversed the Tribunals decision and also dismissed the cross-appeal from Mr. Mihaly.

The Tribunals decision was based on Mr. Mihaly facing a *prima facie* case of discrimination based on the Moore test. The requirements for *prima facie* discrimination was given in the Court of Queen's Bench of Alberta's report as follows, "Requires complainants to show that they have a characteristic that is protected from discrimination; that they experienced an adverse impact; and that the protected characteristic was a factor in the adverse impact (Association of Professional Engineers and Geoscientists of Alberta V Mihaly, 2016 ABQB 61 at para 73). The Tribunal stated that APEGA had discriminated against Mr. Mihaly on the

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grounds of place of origin (Mihaly v. The Association of Professional Engineers, Geologists and Geophysicists of Alberta, 2014 AHRC 1 at para 181) which according to the Alberta Human Rights Act is a protected characteristic. The Tribunal also stated that Mr. Mihaly had faced adverse impacts when they stated, “Mr. Mihaly has been adversely impacted through the process by which he and his foreign qualifications are considered for membership by APEGGA. Mr. Mihaly was required to successfully complete firstly the confirmatory exams and later the FE exam” (Mihaly v. The Association of Professional Engineers, Geologists and Geophysicists of Alberta, 2014 AHRC 1 at para 172). Evidently the Tribunal had stated that due to Mr. Mihaly having to write the FE exam and the confirmatory exams he had faced an adverse impact. They also linked this adverse impact to his protected characteristic in the following excerpt, “Finally, there is no doubt that the adverse impact identified above is related to Mr. Mihaly’s place of origin in that his engineering qualifications were inextricably linked to his place of origin” (Mihaly v. The Association of Professional Engineers, Geologists and Geophysicists of Alberta, 2014 AHRC 1 at para 173). This was based on Mr. Mihaly being educated where he was born and raised. Now we will go through the court of Queen’s Bench decision based on the Tribunal’s Finding.

Madam Justice J.M Ross, from the Court of Queen’s Bench, began by evaluating if the Tribunal was correct in their assessment that Mr. Mihaly had experienced an adverse impact. Justice Ross concluded that it was reasonable for the Tribunal to conclude that Mr. Mihaly did face an adverse impact due to having to write the confirmatory examinations and the FE exam. This was due to having to expend time and resources in order to prepare for and write the examinations (Association of Professional Engineers and Geoscientists of Alberta V Mihaly, 2016 ABQB 61 at para 78). However, later on Justice Ross said that the requirement to pass the NPPE and have one year of Canadian experience did not qualify as an adverse impacts. Justice Ross said that the NPPE was not considered an adverse impact since all applicants were required to pass it, and Mr. Mihaly failed it three times (Association of Professional Engineers and Geoscientists of Alberta V Mihaly, 2016 ABQB 61 at paras 106-107). Also there was no evidence that Mr. Mihaly’s place of origin had anything to do with being unable to find work experience. Therefore, while the inability to find work may have impacted Mr. Mihaly it could not be linked to APEGA. This led to Ross’s decision that prima facie discrimination did not occur for the requirements of the NPPE and one year of Canadian experience.

After her evaluation of Mr. Mihaly’s adverse impact Madam Justice J.M Ross assessed if the Tribunal was reasonable in their assessment that Mr. Mihaly had been discriminated against on the basis of place of origin. APEGA had argued that the place of origin was not the same as the place of education, as their decision was based upon where Mr. Mihaly was educated not where he was born and raised. The Tribunal said that because of his place of origin Mr. Mihaly had been treated as a foreign graduate, and since he was educated where he was born and raised they linked his place of origin to his place of education. Ross had agreed that Mr. Mihaly’s place of origin was a factor in his adverse impact as he was educated in his place of origin. This was because the only way Mr. Mihaly could have avoided this adverse impact would be if he didn’t become educated in his place of origin.

Justice Ross had agreed that there was an adverse impact due to a protected characteristic as has been discussed. The next decision she had to make was if APEGA was unreasonable in the requirements they set out based on the Alberta Human Rights Act. She had stated that the

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policies adopted by APEGA were adopted in good faith, and according to the Alberta Human Rights Act is a justifiable defense. Ross went on to say that, “APEGA’s policy of assigning confirmatory exams where competence has not been otherwise established is consistent with the EGPR, and consistent with its objectives of ensuring the competency of professional engineers” (Association of Professional Engineers and Geoscientists of Alberta V Mihaly, 2016 ABQB 61 at para 123). So even though she agreed that the FE and confirmatory exams caused a prima facie discrimination, she found that APEGA’s requirements were justified under section 11 of the Alberta Human Rights Act. Since the quality engineering program he attended was unknown to APEGA, they were reasonable in assigning the exams. She went on to say that, “APEGA’s evidence made it clear that this is done to provide an objective assessment of the qualifications and knowledge required of a competent engineer” (Association of Professional Engineers and Geoscientists of Alberta V Mihaly, 2016 ABQB 61 at para 142). Ultimately she decided that it was not so much discrimination by APEGA but instead it was a justifiable and reasonable requirement that they set in place. It is APEGA’s responsibility to ensure that professional engineers and geoscientists are qualified in order to protect the public. Due to APEGA’s responsibility their requirements are justified.

The Tribunal also ordered APEGA to create a more individualized assessment of Mr. Mihaly. This ordered APEGA to among others, establish a committee to individually assess the qualifications of Mr. Mihaly, match Mr. Mihaly with a mentor, and to review Mr. Mihaly’s transcripts with direct consultation to the Slovak University of Technology (Mihaly v. The Association of Professional Engineers, Geologists and Geophysicists of Alberta, 2014 AHRC 1 at para 249). Justice Ross had stated that these requirements were much too great for the alleged discriminatory conduct, and that the Tribunal’s estimate of the cost was questionable. She also stated that, “More significant than the Tribunal’s assessment of cost, is the failure to consider the impact this form of accommodation would have on APEGA” (Association of Professional Engineers and Geoscientists of Alberta V Mihaly, 2016 ABQB 61 at para 123). She concluded that regulatory bodies are not to be expected to change how they operate fundamentally for an individual.

With regards to Mr. Mihaly’s cross appeal, Justice Ross found that his appeal was dependent upon prima facie discrimination. Since this discrimination was not justified based on section 11 of the Alberta Human Rights Act she dismissed Mr. Mihaly’s cross appeal (Association of Professional Engineers and Geoscientists of Alberta V Mihaly, 2016 ABQB 61 at para 154). In other words, we can see that the purpose of Mr. Mihaly’s cross-appeal was to be awarded with compensation for lost wages. However, since there lacked a link between APEGA’s requirements and his inability to get employment Justice Ross rejected his appeal.

Reflection and Opinion

After researching the details of the case I would have to agree with the ruling by the Court of Queen’s Bench. This is primarily because I believe, that due to the roles of a professional engineer and the direct way it can affect the public, we should ensure that all applicants meet the requirements. Even though the process might not be the fairest for applicants from engineering programs that APEGA has little information on, APEGA has a requirement to the public to ensure professional engineers are qualified. However, based on information in the Court of Queen’s Bench ruling on the required exams, “The FE Exam has a pass rate of 85%.

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Persons who do not pass can retake the exam” (Association of Professional Engineers and Geoscientists of Alberta v Mihaly, 2016 ABQB 61, para 128). It appears that the FE exam is fair as it has a high pass rate and allows multiple attempts.

I found it was hard to agree with many points in the Alberta Human Rights Commissions decisions as they appeared to not be fully thought through. This was especially true in the recommendations that it laid out for APEGA in reviewing Mr. Mihaly’s case. The idea that a special committee of people with a similar background to Mr. Mihaly’s should be created to individually review his case would create a very high standard for APEGA in future cases. This would make it so future applicants could request the same treatment which would lead to a much more inefficient and expensive application process. This could have the potential to either drastically reduce the amount of applicants that APEGA looks at each year, or create a financial issue for APEGA based on the increased costs. Neither of these outcomes seemed to be considered by the Tribunal, there reasoning was, “it would amount to 375 IEG applications for individual consideration every year. This in my view is not a prohibitive number for a large organization like APEGGA” (Mihaly v. The Association of Professional Engineers, Geologists and Geophysicists of Alberta, 2014 AHRC 1 at para 231). I do not agree with this statement as based on the requirements they gave, this would require 375 special committees with similar backgrounds to the applicant create an individualized plan for them. It’s also important to remember that APEGA already individualizes the process for each applicant based on where they go their degree from and the quality of their work experience.

Another point of contempt I have with the Tribunals decision was how they seemed to minimize the need to ensure professional engineers are properly trained. This was seen through how they handled the idea of the FE exam and the confirmatory exams. It was reasonable to say that Mr. Mihaly had been adversely impacted by having to write the confirmatory exams and the FE exam as they required additional work. However, since APEGA did not have knowledge of the institution he got his engineering degree from it was fair for them to ensure the level of his training. It would put APEGA in a difficult situation if they were not able to verify the quality of the applicant’s education since they are required to maintain the quality of professional engineers and geoscientists in Alberta. A standardized test allows applicants to be judged on a level playing field. While it may not be perfect it is one of the most efficient and accurate ways to see where a person’s ability is.

The Alberta Court of Appeals decision to dismiss the application in my opinion was the correct one. Since Mr. Mihaly was failing to file the Appeal Record, which caused it to be dismissed the first time, it seems reasonable. Mr. Mihaly then asked to restore the appeal which the Court of Appeals had the ability to either accept it or reject it. Based on the criteria that the Court of Appeals uses to judge if the appeal should be restored or not, it seems that Mr. Mihaly did not attempt to meet any of the requirements. He did not state if there was an error in the decision of the Court of Queen’s Bench, and had no reason for the inability to hand in the appeal record the first time. I believe the Alberta Court of Appeals were correct in their decision to dismiss the restoration as it seemed to lack the information needed to potentially change the decision.

APEGA should accommodate foreign-trained engineers and geoscientists. I also believe that the level of accommodation should be done within reason. The ability of foreign-trained

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engineers and geoscientists be put on a path to a successful application is important. Due to the large number of highly trained immigrants that come to Alberta we would be doing ourselves a disservice if we did not allow these individuals the opportunity to continue to work in their field of study. It's also a key component to ensure that new Canadians in Alberta have a chance to succeed and quickly integrate to their new country.

It is also important to discuss how foreign trained engineers and geoscientists should be accommodated in their applications. I believe APEGA has done a good job in creating mutual recognition agreements with a variety of different countries. This program is a great accommodation to foreign-trained engineers, as they usually do not need to do any type of exams to prove their competency. Some forms of accommodation I believe would help would be offering courses to help new applicants be as successful as possible. These courses could be in helping learn the different terms or regulations used in Alberta, to help learn English, or to help pass any exams applicants may have to take. Also it would probably be beneficial to the applicant if these courses could be paid for after they have either been hired or have had their application accepted. This would help alleviate stress from the applicants as most likely they have recently moved to Canada and that's why they are applying to APEGA. Another form of accommodation that could be applied would be to allow the applicants to apply for internship positions similar to what students would do, to help them get the one year of Canadian experience.

References

- About APEGA. (n.d.). *APEGA*. Retrieved February 14, 2018, from <https://www.apega.ca/about-apega/>
- About court of Queen's Bench. (n.d.). *Alberta Courts*. Retrieved February 14, 2018, from <https://albertacourts.ca/qb/about/jurisdiction-and-governance>
- About the commission. (2012). *Alberta Human Rights Commission*. Retrieved February 14, 2018, from <https://www.albertahumanrights.ab.ca/about/Pages/about.aspx>.
- APEGA. (2017). *In the Court of Appeal of Alberta*. Retrieved from <https://www.apega.ca/assets/news-releases/2017-milhaly-court-decision.pdf>
- APEGA. (2016). *Registration services: Professional member and licensee applicant guide*. Edmonton, AB: APEGA.
- Mihaly v. The Association of Professional Engineers, Geologists and Geophysicists of Alberta. (2014). AHRC 1 (CanLII), Retrieved from <https://www.canlii.org/en/ab/abhrc/doc/2014/2014ahrc1/2014ahrc1.html?search>
- Province of Alberta. (2000). *Alberta Human Rights Act*, Retrieved from <http://www.qp.alberta.ca/documents/Acts/A25P5.pdf>
- University of Calgary Faculty of Law. (2016). *Alberta Court of Queen's Bench Overturns Discrimination Decision on Foreign Trained Engineer*. Retrieved February 14, 2018, from <https://ablawg.ca/2016/03/23/alberta-court-of-queens-bench-overtuns-discrimination-decision-on-foreign-trained-engineer/>