

# Mihaly v APEGA Court Case Study

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## **Introduction**

This assignment is to focus on Mihaly vs APEGA court case. The involved stakeholders of the case, a background history, a detailed examination of the Queen's Bench June Ross decision, an examination and questionnaire on the decisions of each government agency and APEGA foreign accommodation question are examined in detail. The purpose of this assignment is to understand the parties involved in the profession of engineering, examine the Mihaly v APEGA case in detail and how it applies to Alberta's engineering profession.

## **Stakeholders**

Describe/explain the key stakeholders associated with this issue. Include 3 other stakeholders

**APEGA (The Association of Professional Engineers, Geologists, and Geophysicists of Alberta)**

APEGA is a self-governing organization that registers, sets practice standards and determines disciplinary actions for its members. It was originally created during the 1920s as the Association of Professional Engineers of Alberta (APEA) and later in March 2012 was called APEGA. This group is where members register to practice professional engineering in Alberta.

**The Court of Queen's Bench**

This is the Superior Trial Court for the Province, hearing trials in civil and criminal matters and appeals from the Provincial Court. It consists of the Chief Justice of the court and has several judges elected supernumerary status after many years of service. In Alberta, there are 11 districts and 13 locations for court sitting.

**The Alberta Human Rights Commission**

This is an independent commission of the Government of Alberta. Their focus is to facilitate equality and reduce discrimination. They provide public information and education to help Alberta resolve human rights complaints. It relies on Human Rights Law, which differs to the Charter.

**Mr. Ladislav Mihaly**

Mr. Mihaly was born, educated and certified as an engineer in Czechoslovakia obtaining a Diploma with a specialization in Technology of Fuels and Thermal Energy from the Slovak Technical University in Bratislava in 1975. He moved to Canada and applied to become a professional engineer in 1999.

## Alberta Professional Engineers

A decision of the court regarding APEGA affects engineers who are registered as members. Any regulation that changes the registration requirements to become a member will affect the credibility and integrity associated with being an engineer.

## Alberta Public

Changing the laws within the engineering profession will ultimately affect who can become an engineer, thus the quality and competence of said engineers could affect public safety. By lowering the standard of APEGA, the immediate distinction between incompetent and competent engineers becomes skewed and as a result would put the public in danger also resulting in billions of dollars in damages.

## Alberta Government

Court hearings, cases and judgement costs the city a lot of time and resources. It's expensive to run these government positions. More so when a lawsuit is won there is a significant amount of money demanded as a result.

## Background [1]

Mr. Mihaly moved to Canada and applied to become a professional engineer in 1999. He was asked to write the National Professional Practice Exam, for which he failed on January 17, 2000. He reapplied to write the test on October 16, 2000 and didn't attend. He asked to take the test again and on July 15, 2002 and failed. APEGA reactivated his file again on June 3, 2002 and advised him to write three confirmatory exams by May 2003 and the Engineering Economics course or exam by November 2003. Again, he wrote the NPPE on January 20, 2003 and failed. He asked in 2006 to reactivate his application for a third time for which APEGA requested an updated resume and a list of references. In August 2007 the Board of Examiners reconsidered his application and determined that he had to complete three confirmatory exams plus a course or examination in Engineering Economics or the Fundamentals of Engineering Examination, for which they determined that Mihaly didn't acquire the one year of professional engineering position where he worked because it was not at a D level. He was thereby required to obtain a one-year acceptable D level Canadian engineering experience. He did not write the required examinations.

As a result, Mihaly complained to the Human Rights Tribunal on August 5, 2008 that APEGA discriminated against him due to his place of origin. The Tribunal established with Mihaly APEGAs assessment method constituted discrimination under the Alberta Human Rights Act. The Human Rights Tribunal ruled February 2014 APEGA to pay \$10,000 as well as to reconsider the application [2]. The order they made required APEGA to hire a committee to assess and apply "individual assessment options to Mr. Mihaly with a view to correcting any perceived academic

deficiencies” including support. The Tribunal declined to award lost wages to Mr. Mihaly due to the uncertainties of the case.

They appealed to Alberta Court of Queen’s Bench and an initial hearing was on December 12, 2014.

The argument the Tribunal used was that APEGA’s policies were “based on the assumption that engineers are not at par with Canadian engineering accreditation standards”. The court disagreed due to a lack of evidence and provides that it was not based on assumptions but knowledge about programs. Mr. Mihaly had to establish three things via the Moore test: (1) he has a characteristic that is protected from discrimination; (2) he experienced an adverse impact; (3) the protected characteristic was a factor in the impact. The court agreed with the Tribunal in (1) and (2), and partly agreed with (3). However, what the Tribunal failed to establish that the exams required all applicants, Mr. Mihaly’s failure of the exams was not due to his place of origin and the difficulty to find a job was due to having more than six years in a junior position. APEGA’s defense was that the exams are based on competence and was consistent with the Engineering and Geoscience Professionals General Regulation. They stated that there was no evidence that internationally educated graduates with entry level competence would have any difficulty passing the FE Exam that entry level engineering. This was to ensure that the competence is reasonably necessary to ensure safe practice as a professional engineer and accommodation to the point of undue hardship cannot result in fundamentally altered standards and require APEGA to act outside of its regulatory role. Mihaly was seeking an award of \$1,000,000.00 and registration with APEGA or \$2,000,000.00. The Queen’s Court declined the case on January 26, 2016, where Madam Justice Ross upheld APEGA’s appeal and reversed the decision of the Alberta Human Rights Commission tribunal and dismissed the cross-appeal by Mihaly. He attempted to go further with the Alberta Court of Appeal but failed to do so because he didn’t follow up with the appeal. Thus the Alberta Court of Appeal dropped the case.

### **The Court of Queen’s Bench Decision**

The Queen’s Bench Justice June Ross reviewed the Meiorin test that was suggested by the Tribunal. The test was meant to determine whether discrimination took place in the workplace. June found that the Tribunal’s suggestion that APEGA should become more proactive and discuss agreements with other countries’ institutions from engineers that come to Canada which no evidence was found nor does APEGA have the resources for it. She also found that APEGA’s policy of assigning confirmatory examinations was consistent with the EGPR and consistent with its objective of ensuring the competency of professional engineers. She found that given the FE Exam, there was no impact on the exam disproportionately impacting foreign educated applicants, for which the FE Exam had a pass rate of 85% and people could re-write the test. She compared the Mihaly case with two cases where the Meiorin test took place, *Calio v College of Nurses of Ontario*, 2011 and *LPG v College of Audiologist and Speech Language Pathologist of*

Ontario, 2009 which in both cases concluded that the agencies concluded that the standardized tests were reasonable. Both the requirements of examination to be waived, which is reserved for applicants who completed a graduate degree in Canada or an MRA country, or if they have ten years of experience, Mihaly didn't have.

As a result of the Tribunal's unreasonable interpretation of the EGPR, including his unsupported assumption that the FE Exam disproportionately excludes foreign trained engineers, his failure to demonstrate entry level engineering competence, his failure to consider relevant factors in assessing undue hardship and to search for possible accommodations, June Ross decided that the decision of the Tribunal was to be reversed. She also found that Mihaly's cross-appeal did not fall under s 11 of the AHRA which was explicitly a section that focused on discrimination.

## **Reflection and Opinion**

*Do you agree with the decisions of the Alberta Human Rights Commission, the Court of Queen's Bench, and the Alberta Court of Appeal? Why or why not?*

Regarding the Alberta Human Rights Commission, they were right to determine that Mihaly had a characteristic that was protected by discrimination. They did their job at providing public information and the laws under which the defendant was protected. They made the right decision by not awarding Mr. Mihaly with "lost wages" due to the circumstances of his position. They went wrong when establishing that APEGA was discriminating against Mihaly as they didn't do any research into the FE exam itself to determine the statistics of foreign trained engineers to Canadian engineers or had any substantiating evidence. Their decision to force reconsideration of the APEGA application and payment to Mihaly of \$10,000 was unwarranted because they didn't consider the fact that Mihaly failed the standardized test twice and didn't attend one. More so they lacked jurisdiction to do so.

I agreed with June Ross' decision because given the circumstances, after extensive review of the case Mihaly did not qualify for the APEGA application, had a questionable employment history, reviewed APEGA's standardized test and a few examples of court cases that were rejected in favor of the standardized test to ensure the public's interests and safety. The legal framework of APEGA and the requirements were justified and Mihaly simply didn't meet them. To put it simply as APEGA CEO Mark Flint stated, "while we respect the important role of the Alberta Human Rights Commission, the tribunal's decision ... were it to stand would have significant negative impacts on the ability of regulators ... and would have resulted in an unacceptable increase in risk to public safety and well-being".

I agreed with the Alberta Court of Appeal to dismiss restoring the appeal of Mihaly. The decision by June Ross was concluded and all the evidence within the court case was decided in fair, extensive detail. Mihaly failed to follow up with the appeal thus there was no point in wasting legal time, so Justice Frans Slatter of the Appeal Court dismissed the case [3].

*Should APEGA accommodate foreign-trained engineers and geoscientists? Why or why not? If yes, how should they?*

There are two sides to accommodating foreign-trained engineers. On one end accommodating them could be good for the economy because the argument can be made that some foreign workers bring marketable skills to Canada. On the other end one could make the case that accommodating foreign engineers could cost APEGA more resources than what's necessary, there would potentially be a noticeable skill gap considering some countries inflate the value of their skills (China on the verge of outnumbering America in terms of publishing research papers [4] and China cracking down on fake peer reviews [5]) and other organizations like APEGA would be affected by being required to capitulate to accommodation thus requiring more time and money for changing policies across Alberta and the rest of Canada. My opinion is neutral. Both sides make a fair argument. I'm more in favor of APEGA being a standardized organization which depends on the competency of said engineer. Broad characteristics such as one's ethnicity, sexuality, place of birth and undue hardship should never be taken into consideration when the responsibility of a profession such that engineering relies on the upmost ability of an engineer to do their duty to ensure public safety and meet company requirements.

## References

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- [3] J. Cotter, "Alberta Court of Appeal won't restore foreign-trained engineer's appeal," CBC news, 12 January 2017. [Online]. Available: <http://www.cbc.ca/news/canada/calgary/ladislav-mihaly-engineers-alberta-foreign-1.3933845>.
- [4] A. Witze, "Research gets increasingly international," International weekly journal of science, 19 January 2016. [Online]. Available: <https://www.nature.com/news/research-gets-increasingly-international-1.19198>.
- [5] D. Cyranoski, "China cracks down on fake peer reviews," International weekly journal of science, 20 June 2017. [Online]. Available: <https://www.nature.com/news/china-cracks-down-on-fake-peer-reviews-1.22176>.