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Mihaly v. APEGA: A Case Study

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1. INTRODUCTION

The purpose of this report is to give an overview of a landmark human rights judgement involving the regulation of Engineering and Geoscience in Alberta.

The report outlines the stakeholders and relevant documents referenced in the judgements and provides a background for the proceedings of the case in the Alberta Human Rights Commission, Alberta Court of Queens Bench, and finally the Alberta Court of Appeal. The report then gives an interpretation of the decision made by the Court of Queens Bench in favour of APEGA and the justification of that decision.

Finally, an opinion and reflection is presented on how the regulation of engineering should function in light of this judgement.

2. STAKEHOLDERS AND RELEVANT DOCUMENTS

Mr. Ladislav Mihaly

Mr. Mihaly is the complainant of the case, first to the Alberta Human Rights Commission and later the appeal to the Court of Queen's Bench. Mihaly, a trained engineer in Czechoslovakia had 2 master's degrees in engineering from schools in that country.¹

Being educated outside of Canada, Mihaly did not meet the requirements for immediate registration with APEGA when he immigrated to Canada in 1999 and was therefore required to take conformational exams not required from an engineer educated within Canada.

Mihaly's failure to meet the requirements of APEGA for registration as a Professional Engineer and the organization's barrier to him registering based on country of origin prompted him to pursue legal action.

Association of Professional Engineers and Geoscientists of Alberta (APEGA)

APEGA is an organization established by the Province of Alberta whose purpose is regulating the title of Professional Engineer. APEGA sets the standards of practice for its members who carry the title P.Eng. to distinguish them as registered engineers.

It is APEGA's argued that a decision in Mihaly's favour, would have had significant negative impacts on the ability of regulators – and not just in engineering but in geoscience, medicine, law, dentistry, and accounting to name but a few – and would have resulted in an unacceptable increase in risk to public safety and well-being.²

At the time the case was first filed, APEGA was referred to as APEGGA; for simplicity, only APEGA will be used as an abbreviation in this report.

The Alberta Human Rights Commission (AHRC)

The Human Rights Commission is an independent commission created by the Government of Alberta under the Minister of Justice and Solicitor General.³ The commissions purpose is to "ensure that all Albertans are offered an equal opportunity to earn a living, find a place to live, and enjoy services customarily available to the public without discrimination."⁴

Mr. Mihaly filed a complaint with the AHRC in 2008 against APEGA alleging discrimination based on place of origin with regards to being denied registration as a Professional Engineer in the preceding years since 1999.⁵

Mr. Mihaly and APEGA submitted evidence to an AHRC tribunal and the decision was delivered February 6, 2014 by Tribunal Chair Moosa Jiwaji.⁶

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The Alberta Court of Queen's Bench (ABQB)

The Court of Queen's Bench is the title of the superior court in the province of Alberta.⁷ The Court heard and delivered jurisdiction on the appeal raised by both Mr. Mihaly, and APEGA, in response to decision made by the Alberta Human Rights Tribunal in February 2014.

The case *APEGA v Mihaly* was presided over by Hon. Justice J.M. Ross. Both parties filed their appeals in 2014 soon after the Tribunal's decision. The appeal hearing was conducted July 24 and 25th 2015 and the final decision was delivered by the Court on January 26, 2016.⁸

Alberta Human Rights Act (AHRA)

The AHRA is an act from the Alberta Legislature and provides protections for human rights in Alberta. All future and current laws in Alberta must observe the protections outlined in the act.

The case *Mihaly v. APEGA* put before the AHRC tribunal concerns sections 4, 7 and 9 of the act. Specifically: (emphasis added)

4. No person shall (a) deny to any person or class of persons any goods, services, accommodation or facilities that are customarily available to the public, or (b) discriminate against any person or class of persons with respect to any goods, services, accommodation or facilities that are customarily available to the public,

7(1) No employer shall (a) refuse to employ or refuse to continue to employ any person, or (b) discriminate against any person with regard to employment or any term or condition of employment,

9 No trade union, employers' organization or occupational association shall (a) exclude any person from membership in it, (b) expel or suspend any member of it, or (c) discriminate against any person or member,

because of the race, religious beliefs, colour, gender, gender identity, gender expression, physical disability, mental disability, age, ancestry, **place of origin**, marital status, source of income, family status or sexual orientation of that person or class of persons or of any other person or class of persons⁹

The Moore Test

The Moore test is used as a legal test for determining whether an action constitutes discrimination. The test is used in both the AHRC and ABQB judgements to determine discrimination against Mihaly by APEGA. The Moore tests states that to establish discrimination, complainants must show that

1. They have a characteristic which is protected by discrimination
2. That they experienced an adverse impact
3. The protected characteristic was a factor in the adverse impact¹⁰

Engineering and Geosciences Professions Act (EGPA)

The EGPA is the legislative document that APEGA operates under. It outlines the process for registration with APEGA and the requirements that applicants are judged under.

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The EGPA states that the Board of Examiners may require applicants to pass examinations set by the board or obtain additional experience before membership in APEGA is granted.¹¹

3. BACKGROUND

Mr. Mihaly, initially applied for his membership with APEGA in 1999 previously having procured letters of assurance from the Canadian Council of Professional Engineers and the Canadian Council of Technicians and Technologist that his Czechoslovakian master's-level degrees would be acceptable education in Canada. Upon completion of his application, APEGA informed Mihaly that he would be required to complete the NPPE, an ethics and professional practice exam required of all APEGA applicants as well as 3 additional conformational exams due to his country of origin and credentials.

Mihaly attended and failed the NPPE and did not attend his second scheduled attempt 9 months later and his application was withdrawn by APEGA. Mihaly failed a third attempt at the NPPE a further 19 months later and his application was withdrawn for a second time.

The registration with APEGA was reactivated a second time, not in 2007 and Mihaly again failed to complete the required exams, instead filing a complaint with the Alberta Human Rights Commission.

Initial Human Rights Complaint

Mr. Ladislav Mihaly brought his case to the AHRC in 2008 claiming he was discriminated against with respect to the above-mentioned sections of the Human Rights Act.

A tribunal acting for the AHRC took evidence from the two parties. Mihaly argued that his unique qualifications and comprehensive experience as an engineer in Czechoslovakia were not properly considered solely due to his country of origin. APEGA argued that the Human Rights act does not apply to discrimination based on origin of *academic qualifications*.¹² APEGA then testified that Mihaly's treatment as an applicant was no different from that of other applicants with unaccredited engineering degrees in Canada.

The decision from the tribunal was in Mihaly's favour and stated that although there was no direct stereotyping of Mihaly due to his origin, there was a connection between his place of origin and his denial of application. The tribunal further pointed out that APEGA did not take any action to accommodate Mihaly by more closely investigating the validity of his foreign credentials or providing more personalized forms of examination.

Mr. Mihaly was awarded a settlement of \$10,000 and ordered APEGA to reconsider Mihaly's application.

Court of Queen's Bench Appeal

In November 2014, APEGA filed an appeal of the decision. Mr. Mihaly also filed a cross appeal.

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Justice Ross presiding over the case considered the evidence presented to the Tribunal and the reasoning of its decision.

APEGA raised the following issues with the Tribunal's decision (as quoted from the judgement)¹³

1. Procedural fairness: Did the Tribunal breach the rules of procedural fairness when it decided issues that were not raised by or with the parties?
2. Jurisdiction: Did the tribunal err when he held that he had jurisdiction to determine whether the discrimination based on the place a person receives their education constitutes discrimination based on place of origin?
3. *Prima face*: Did the Tribunal rely on the correct legal test, and reasonably apply that test, to determine whether Mr. Mihaly had demonstrated *prima face* discrimination?
4. Justification: Was the Tribunal's decision that APEGA's registration requirements were unjustified unreasonable?

Ross, in the written judgement concluded that the decision of the Tribunal was procedurally fair and applied with the proper jurisdiction. Ross however, disagreed that the Tribunal applied the legal test correctly and incorrectly ruled that APEGAs registration requirements were unreasonable. Therefore, the decision made by the AHRC was reversed.

The details of the decision are discussed in greater detail in *Section 4*.

Dismissal in the Alberta Court of Appeal

In February 2016, one month after the Queen's Bench decision, Mihaly filed for an appeal.

The appeal was dismissed in January 2017 for the following reasons.

1. Decisions from the Court of Queen's Bench are typically final.
2. Mihaly did not file the required Appeal Record.
3. Mihaly's evidence for appeal was not sufficient. He cited Canadian – European Union and UNESCO higher education agreements, neither of which "holds that [APEGA] was required to consider [Mihaly's] European credentials as equivalent to Canadian ones."¹⁴

4. THE COURT OF QUEEN'S BENCH DECISION

In the Court of Queen's Bench decision, Justice Ross considered four points of contention identified by APEGA in the appeal as presented in *Section 3* and determined that.

1. The Justice agreed that the AHRC Tribunal did not breach procedural fairness when considering the evidence because
 - a. APEGA and Mr. Mihaly were given the opportunity to respond to all evidence presented.
 - b. The Tribunal did not make its decision based on new grounds not raised in the proceedings of the case.

2. The Tribunal rightfully concluded that discrimination based upon the place one receives education can constitute discrimination based upon place of origin under the Human Rights Act.

APEGA argued that place of education and place of origin cannot be construed in this case due to the decision of *Grover v Alberta* which ruled the opposite. The Tribunal and Ross disagreed with APEGA because the facts of the *Grover* case cannot be applied to the decision of *Mihaly v APEGA*.

3. The Tribunal did not fully apply the *Moore* test when considering the nature of the discrimination.
 - a. The Tribunal and Ross agreed that Mr. Mihaly was treated as a foreign student due to his place of origin, which is a protected characteristic.
 - b. *The Tribunal and Ross also agreed that Mr. Mihaly had experienced an adverse impact due to the examination requirements.*
 - c. Ross disagreed with the Tribunal that there was not substantial evidence for a direct link between Mihaly's place of origin and his adverse impact based on the evidence presented by Mr. Mihaly. Ross cited Mihaly's failure to pass the NPPE exam and meet the employment requirements, both standards required of all registrants as being irrelevant to Mihaly's place of origin.
4. Ross, stated that APEGA was justified in their treatment of Mihaly based on place of origin because accommodating Mihaly would have caused undue hardship on the organization for the following reasons.
 - a. Conducting a comprehensive review of Mihaly's credentials would put significant burden on APEGA and alter its mandate as a regulator.
 - b. Assigning standardized conformational exams was necessary to evaluate the unknown quality of education Mihaly received, not because his level of education was perceived to be of poor quality by APEGA
 - c. The Tribunal's order for APEGA to form a panel to assess options to assess Mihaly individually was far "beyond the scope of any discrimination found" and required significant resources.

5. REFLECTION AND OPINION

I agree with the decision made by the Alberta Court of Queens bench for two reasons.

1. There was no clear evidential link that Mihaly had experienced adverse impact according to the *Moore* test due to his place of origin. There was only evidence that he might have experienced it.

Mihaly was assigned to write conformational exams because his degree was not recognized as equivalent to a Canadian one. However, Mihaly did not write any of the conformational exams prior to filing his complaint. Mihaly did write the NPPE exam

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which he failed. This exam is required of all engineers registering with APEGA and therefore does not discriminate based on place of origin.

If Mihaly had shown that he struggled with meeting the requirements of the conformational exams or had attempted and failed them, there may have been a stronger evidential link between place of origin and the adverse impacts.

2. Mihaly, over the course of the case argued that he was personally discriminated against due to his place of origin. He did not imply that other engineers with credentials obtained outside Canada are also victims of discrimination.

This is problematic when you consider the case made by Mihaly. There is no evidence presented that Mihaly received treatment that would not otherwise be required of engineers with similar qualifications as himself. All engineers applying without a Canadian bachelor's degree must write conformational exams except for applicants with 10 or more years of experience with increasing responsibility ¹⁵

APEGA, does not provide accommodations for foreign trained engineers and geoscientists. In my opinion, I see arguments both for and against implementing accommodations.

The requirements for foreign trained engineers and geoscientists do provide a significant barrier to entry that Canadian trained members do not have. The added costs of studying for and completing the exams may be prohibitive.

The Foreign Degree list that APEGA uses to determine how many conformational exams are assigned has no gradient. Applicants are assigned 3 exams if their institution is on the list which includes thousands of others of varying prominence reputation. It might serve APEGA to grant certain institutions special status based on past performance of applicants on the conformational and FE exams. If a school has a much higher average performance on the exam it should be considered for more comprehensive evaluation and possibly considered as an equivalent institution by APEGA the same way US schools are.

I do think that standardized exams are a fair way to assess the competency of an engineer and their educational qualifications. The standardized nature of the exam, especially the popular FE exam makes it easy for an applicant to prepare for the exam content and practice for it. Furthermore, the pass rate of 85% for the FE exam among APEGA applicants and the ability to re-take the test if you fail is not a prohibitive requirement.

6. REFERENCES

¹ Mihaly v. Association of Professional Engineers, Geologists and Geophysicists of Alberta (AHRC, 2014)

² The Association of Professional Engineers and Geoscientists of Alberta. APEGA's Successful Appeal of Alberta Human Rights Commission Tribunal Decision Protects Public (Press Release, January 27, 2016).

³ Government of Alberta. 2012. About Us: Alberta Human Rights Commission. October 24. Accessed February 12, 2018. <https://www.albertahumanrights.ab.ca/about/Pages/about.aspx>.

⁴Ibid.

⁵ Mihaly v. APEGGA. (AHRC, 2014)

⁶ Ibid.

⁷ Alberta Courts. 2018. Court of Queen's Bench of Alberta. Accessed February 12, 2018. <https://albertacourts.ca/qb/home>.

⁸ Association of Professional Engineers and Geoscientists of Alberta v. Mihaly (ABQB, 2016)

⁹ Alberta Queen's Printer. Alberta Human Rights Act. Accessed February 12, 2018. <http://www.qp.alberta.ca/documents/Acts/A25P5.pdf>

¹⁰ APEGA v Mihaly (ABQB, 2016)

¹¹ Mihaly v APEGA (AHRC, 2014)

¹² Ibid.

¹³ APEGA v Mihaly (ABQB, 2016)

¹⁴ Mihaly v Association of Professional Engineers and Geoscientists of Alberta (ABCA, 2017)

¹⁵ Mihaly v APEGA (AHRC, 2016)