



# The Mihaly vs APEGA Case

Course: ENGG 513

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## Introduction

This report studies a legal dispute between an internationally educated engineer, Mr. Ladislav Mihaly, and APEGA, the regulatory body for engineering and geology in Alberta. Mr. Mihaly accused APEGA of discriminating against him due to his place of origin after he was denied a professional license. After his complaint to the Alberta Human Rights Commission, the tribunal agreed that Mr. Mihaly was discriminated against, and awarded him compensation, as well as a request for APEGA to reconsider his application. This decision caused controversy and was appealed by both Mr. Mihaly and APEGA. The case explores the complex issues of the intricacies of what constitutes discrimination, as well as the justifications necessary to uphold the principles of entry into the engineering profession.

## The Stakeholders

### APEGA

The Association of Professional Engineers and Geoscientists of Alberta. This regulatory body in Alberta are the gateway to holding a professional engineering license. As with any professional license, a set of requirements must be met before admission. The academic and technical experience requirements were the essence of this case, both of which were scrutinized in Mr. Mihaly's application. After their rulings were deemed discriminatory, APEGA appealed the decision made by the AHR commission to grant Mr. Mihaly \$10,000 for general damages and reconsider his application. APEGA appealed this decision and argued that it was unjust and that their assessment of Mr. Mihaly was justified and did not constitute discrimination.

### Mr. Ladislav Mihaly

The case revolves around Mr. Mihaly, an engineer who was born and raised in Czechoslovakia (CQBA, 2016, p. 3) where he completed his bachelor's degree with a specialization in the technology of fuels and thermal energy (UBS, 1975) and his masters with a certificate for corrosion engineering from the Institute of Chemical Technology (Prague, 1981). His origins, both place of birth and place of education were significant in the case, as they defined the grounds for his accusation of discrimination. After coming to Canada, he applied for his P.Eng membership three times and was declined admission, finally leading to his complaint against APEGA for discriminating on the basis of his place of origin.

### Alberta Human Rights Tribunal

The statutory agency that controls human rights in Alberta. Mr. Mihaly complained to the Human Rights Commission about APEGA's discriminatory actions. The tribunal (Chair: Moosa Jiwaji (AHRC, 2014, p. 1)) was in charge of determining the validity of this accusation and if it constituted discrimination. After siding with Mr. Mihaly and awarding him \$10,000, the tribunal's controversial decision was under appeal by both Mr. Mihaly and APEGA, escalating to the attention of the Court of Queen's Bench.

## **The Court of Queen's Bench**

The highest trial court of the province, responsible for hearing trials from civil and criminal matters, as well as appeals from decisions of the provincial court and in this case, the human rights tribunal. The appeal made by both Mr. Mihaly and APEGA was investigated and it was finally led to the reversal of the tribunal's decision by Justice J.M. Ross (CQBA, 2016, p. 1). The court reviewed APEGA's concerns, specifically the aspects of procedural fairness, jurisdiction, *prima facie* discrimination and justification.

## **Canadian Engineering Accreditation Board (CEAB)**

A committee that passes assessments on both Canadian and international engineering programs concerning their transferability. This board undergoes a very in-depth process of assessing curriculums, faculties, and facilities to make judgements on whether or not a specific degree or program can be considered accredited or otherwise equivalent to an accredited engineering program. APEGA look to the CEAB for information of foreign institutions when determining the accreditation requirements. (CQBA, 2016, p. 1)

## **APEGA's Board of Examiners**

A committee of over 50 members within APEGA that examines and assesses the qualifications of an applicant. Both academics and technical experience are considered by the board, and judgements about the equivalency of degrees of professional experience can be made here. The board of examiners consists of 25 education reviewers from academia and 25 experience reviewers that are professionals. This committee was responsible for shaping APEGA's decisions in the process. (CQBA, 2016, p. 6)

## **The Court of Appeal**

The highest appeal court in the province. The Court of Appeal can look at applications and appeals with respect to decisions of other courts. This court was responsible for hearing Mr. Mihaly's complaint that the Court of Queen's Bench did not use appropriate evidence to make their decision to reverse the order of the human rights tribunal.

## **Background**

Mr. Mihaly first moved to Canada in 1999 and applied for his APEGA membership. APEGA reviewed his application and transcripts and required him to write a national professional engineering examination (NPPE), which he then wrote and failed on January 17, 2000. After further review, they informed Mr. Mihaly that upon passing the NPPE, he was to participate in a course or exam in engineering economics, as well as write three confirmatory exams by May 2001. APEGA had determined these requirements through reviewing Mr. Mihaly's academic history and accreditation standards.

Mr. Mihaly reapplied but was not present on the day of the exam in October 2000. As a result, he was informed that his application was withdrawn by APEGA. Mihaly reapplied and failed the NPPE exam another two times in 2002 and 2003. In 2006, Mihaly once again applied for his APEGA membership and was assigned the choice of the three confirmatory exams (same as in the previous applications), or a fundamentals of engineering (FE) exam that had recently been incorporated as a replacement to the confirmatory exams. As before, engineering economics and 1 year of Canadian professional experience was also required, which Mr. Mihaly had failed to cumulate since he had not worked in a “D” job position (CQBA, 2016, p. 4) .

Mr. Mihaly did not write the required examinations and filed a complaint with the Alberta Human Rights Commission in 2008, resulting in the inception of this case. Mr. Mihaly accused APEGA of discriminating against his place of origin. After succeeding, Mr. Mihaly was awarded \$10,000 in general damages in 2014, in addition to the request that APEGA reconsider his application and appoint a committee to produce alternatives to the examinations so that he can be individually assessed to correct any academic deficiencies.

Both parties did not support this decision and appealed to the court of Queen’s bench. Mr. Mihaly believed that he deserved to be compensated for lost wages, which the tribunal had not awarded as there was no presented evidence, nor a “connection between the discrimination and any loss of wage” (CQBA, 2016, p. 4). On the other hand, APEGA did not feel that their actions were discriminatory but necessary for the assurance that an engineer is competent and can work safely without putting public health and the environment at risk.

Three witnesses were present to give evidence on behalf of APEGA’s registration process (CQBA, 2016, p. 5). The first was Dr. David Lynch, the Dean of engineering at the University of Alberta. He determined that examinations were required since Slovakia (the country of Mr. Mihaly’s education) was not a member of the mutual recognition agreement (MRA) countries that are recognized by the CEAB. He explained that institutions that are not on the MRA can request a review from the CEAB for accreditation and that UBS had never applied. In this case, a foreign degree (FD) list is reviewed and the requirement of three confirmatory and FE exams is established unless a graduate degree in Canada (or an MRA country) is pursued, or ten years of engineering experience showing progression and responsibility have been attained by the applicant.

The second witness, Dr. Gary Faulkner, was the Chair of the APEGA board of examiners. He testified about the review of Mr. Mihaly’s particular application. In terms of education, it was determined that Mr. Mihaly’s master’s degree was found to be equivalent to a Canadian bachelors and also related more to chemical engineering as opposed to mechanical/petroleum. The experience reviewers found that Mr. Mihaly did possess “long experience” in piping design and fabrication (CQBA, 2016, p. 7), however, this experience did not demonstrate increasing complexity and responsibility, which was enough to not allow the exemption of the required examinations.

Mr. Mark Tokarik was the deputy registrar for APEGA and the third witness of the case. Further evidence regarding the application process and Mr. Mihaly’s application was presented. As UBS was on the FD list, three confirmatory exams (or FE) were assigned rather than five, which could have been required if the institution was not on the list. Furthermore, as was explained

above, the board had declined Mr. Mihaly's request to waive the exam due to his experience, which they had deemed inadequate.

In November 2014, APEGA filed their appeal and the respondent, Mr. Mihaly who was self represented, filed a response statement (CQBA, 2016, p. 7). The appeal hearing proceeded in July 2015 and four issues were raised by the appellant (discussed in the next section), which were scrutinized and considered for the final decision. The disposition of the appeal sided with APEGA, who wanted the tribunal's decision to be reversed. After hearing the witnesses, reviewing APEGA's four issues and the similarity of other cases, the court found that the tribunal's decision had been unjustified and lacking evidence. As a result, the tribunal's decision was reversed and Mr. Mihaly's cross appeal, which depended on evidence of discrimination, was dismissed by Justice J.M. Ross in January 2016.

In February 2016, Mr. Mihaly appealed the decision of the Court of Queen's Bench but did not further strengthen his application and the appeal was struck under R. 14.16(3) for not correctly filing the appeal (Court of Appeal of Alberta, 2017, p. 2). The appellant, Mr. Mihaly, then attempted to restore the appeal again in December 2016, claiming that the Court of Queen's Bench had failed to accept materials that would support his application before, specifically a more accurate FD list and international agreements between Canada and the European Union. These were not adequate for justifying a restoration of the appeal and were therefore dismissed by Justice J.A. Slatter of the Court of Appeal in January 2017 (Court of Appeal of Alberta, 2017, p. 1).

## The Court of Queen's Bench Decision

The court's decision on whether APEGA's standards constituted discrimination was based on scrutinizing the four elements that shaped APEGA's complaint in response to the tribunal's decision, which included procedural fairness, jurisdiction, *prima facie* discrimination and justification. Under s11 of the AHRA, the person or organization accused of contravening the AHRA will be pardoned if the "alleged contravention was reasonable and justifiable in the circumstances". This allowed APEGA to appeal the tribunal's decision and made the court responsible for scrutinizing the above four issues. (Province of Alberta, 2000, p. 10).

APEGA believed that issues that were not relevant to the case itself were being raised, breaching the procedural fairness rules of the court. The tribunal claimed that APEGA had violated s8(b)(ii) of the EGPR by assigning Mr. Mihaly a series of examinations that were not "for the purpose of correcting perceived academic deficiencies" (CQBA, 2016, p. 9). APEGA determined that the tribunal misinterpreted this section of the EGPR incorrectly, since a disjunctive "or" is present in the statement "confirmatory examinations or examinations for the purpose of correcting a perceived academic deficiency". APEGA were not given an opportunity to address this claim during the hearing and were also mentioned the fact that Mr. Mihaly never raised Section 8 of the EGPR, thus justifying the argument of breaching procedural fairness.

In support of this argument, APEGA brought forth another case, Amacon (CQBA, 2016, p. 9), in which a new finding was presented and the duty of fairness allowed both parties to respond to this new “ground” of decision before the arbitrator can make an independent conclusion. However, the judge believed that parties do not always have the right to be heard for every point in the law that is referred to during a case. The focus of the case was to determine the presence of discrimination in APEGA’s standards, not to determine the requirement of examinations that correct perceived academic deficiencies. As a result, the above accusation was not a “ground” for the final decision, and thus did not constitute the breaching of procedural fairness.

The second issue was jurisdiction, with the reasoning that Mr. Mihaly’s complaint was regarding discrimination against place of origin, which in the opinion of APEGA, did not constitute place of education. The judge believed that the issue of what constitutes *prima facie* discrimination can be addressed by conducting the Moore legal test, which arose from another case in the past. (CQBA, 2016, p. 11) This test would require a complainant to show that they have a characteristic that is protected from discrimination; and that the characteristic was a factor in experiencing an adverse impact. According to the Moore test, the “place of education” does not necessarily have to fall within “place of origin”, however, discrimination was not only based on the listed grounds in the AHRA and would also occur if a neutral rule has an adverse impact (requirement of multiple exams) that was caused by a ground for discrimination (place of origin). As a result, the court established that the tribunal did not lack jurisdiction (CQBA, 2016, p. 11).

Next, *prima facie* discrimination, or the discrimination where the plaintiff has sufficient evidence proving that an organization discriminated against them, was existent. The Moore test was again analysed to see whether the discrimination against “place of origin” was due to any arbitrariness or perpetuation of historical stereotypes shown by APEGA’s standards (CQBA, 2016, p. 12). The tribunal had equated the fact that Mr. Mihaly was a foreign graduate as a proxy for the place of origin and determined the confirmatory and FE exam to be considered as the adverse impact. This brought up the question of what constitutes adverse impact. Since Mr. Mihaly had never sat the above exams, there is uncertainty over whether or not it should be considered adverse impact. However, the court believed that the mere preparation and the expending of resources and money was considered as adverse impact. The tribunal argued that APEGA’s requirements to immigrants was discriminatory as they “perpetuate disadvantage” due to the organization’s lack of individualized assessments (CQBA, 2016, p. 14).

The turning point for the case came when APEGA challenged the tribunal’s claim of their policies being discriminatory and that APEGA’s code put foreign engineers on a lower par than Canadian graduates (CQBA, 2016, p. 15). They argued that no assumptions are made until the CEAB accreditation has been satisfied by the institution, meaning that no matter where the individual is from, the most significant factor is CEAB’s accreditation. APEGA’s decision to assign the exams was made since no information on the institution was available, not because the institution was anyway inferior to Canadian (or MRA) institutions. The court decided that the tribunal was unjust in classifying APEGA’s actions as discriminatory, especially since no evidence was referenced to support this claim.

Although APEGA cited different cases to attempt to prove that place of origin did not create adverse impacts for Mr. Mihaly, the court considered them irrelevant as they did not involve the correct legal test, which in the court's belief was the Moore test. It was determined that arbitrariness/stereotyping does not factor into the Moore test, and that Mr. Mihaly needed more evidence showing the discrimination against place of origin with the adverse impact he faced. The court decided that Mr. Mihaly's adverse impacts could not have been avoided, unless he had been educated in Canada or took a graduate degree from a Canadian university, thereby showing that the place of origin did have an impact. (CQBA, 2016, p. 18) On the other hand, the requirement to write the NPPE and gain Canadian experience was found to be justified since it necessary for all foreign applicants, no matter where they are from. As the tribunal had failed to apply the Moore test correctly towards the NPPE/Canadian requirements, the *prima facie* discrimination accusation was deemed unreasonable and dismissed.

Justification was APEGA's final issue with the human rights tribunal. APEGA must provide justification of their actions in order for an apparent contravention of the human rights act, as per s11 of the AHRA. The court agreed with the tribunal in terms of the legal test for justification utilized in the existing circumstances (CQBA, 2016, p. 19). Two of the three requirements needed to satisfy this test were met but the tribunal was not satisfied with the final element, involving the defendant not being able to accommodate a particular individual "without incurring undue hardship". The tribunal believed that APEGA could have reasonably accommodated Mr. Mihaly, with the rationale that the examinations, both the NPPE and the confirmatory/FE, were unjust. However, as determined before, the NPPE exam was not subject to *prima facie* discrimination. With regards to the confirmatory/FE exam, the tribunal believed a more individualized assessment instead of a standardized exam would have been more appropriate for Mr. Mihaly(CQBA, 2016, p. 20). In addition, the tribunal asked APEGA to take a more active role in assisting Mr. Mihaly's application by creating a committee of foreign engineering graduates to assess Mr. Mihaly, as well as providing a mentor. APEGA argued that this would incur undue hardship as it would be resource demanding and costly. Additionally, APEGA believed that this request will force APEGA to go beyond their regulatory role and require a fundamental change to their standards.

After consideration of the issues that APEGA brought forth, the court decided on the reversal of the tribunal decision and Mihaly's cross appeal was also dismissed as it depended on the presence of evidence showing *prima facie* discrimination, which had not been presented (CQBA, 2016, p. 26).

## Reflection and Opinion

Mr. Mihaly believed that the Court of Queen's Bench had failed to recognize that APEGA's foreign degree listed was dated 2010 and argued that the 2000-2006 version would be more appropriate as it was largely relevant in determining the examination requirements that were requested by APEGA during this time (Court of Appeal of Alberta, 2017). Additionally, Mr. Mihaly brought up two Canadian/European treaties that corresponded to higher level education

recognition between the countries. However, according to Justice Slater, European credentials were never equated to Canadian credentials in the international legislation. Additionally, the violation of these treaties or any of Canada's international obligations was not within the Commission's mandate. As a result, Mr. Mihaly's appeal was again dismissed.

Carol Moen, the registrar of APEGA, believes that "Regardless of where applicants for licensure studied, the same rigorous standards apply. Lowering the standards used to examine if an individual has appropriate education and experience to license would result in an unacceptable risk to Albertans" (Cotter, J. 2017). I believe that this quote is important as it describes APEGA's motivation for their actions. Mr. Mihaly was not rejected for discriminatory reasons. The country of origin, the language proficiency of an individual and the recognition of their educational achievements must always be respected in an ethical society. However, it is important to know that public safety and wellbeing is of utmost importance, especially in a discipline dealing with high energy and hazardous materials. Even in the globalized world we live in now, it is impossible for an organization to know each and everything about foreign programs, which is why a strict, established code is put in place to ensure the competence of engineers in Canada, no matter where they come from.

Using standardized examinations as an assessment method is also a topic of discussion. As students, we have noticed that there are people, regardless of their intelligence levels, who struggle and underperform in exam environments. However, a strictly regulatory body like APEGA should not have to accommodate each individual according to their preference. There is also the fact that Mr. Mihaly never wrote the confirmatory exams, which questions the true extent of the "adverse impact" that he experienced, although the judge believed that even preparation and knowledge of having to write the exam is enough to constitute this adverse impact. Looking at the syllabus of the NPPE exam (APEGA, 2016), the content is based on professionalism, ethics and law of practicing engineering, and does not include a technical component. This raises some questions. On one hand, failing this exam could mean that Mr. Mihaly did not properly understand the ethics and laws that govern engineering in Canada, which could result in unethical and dangerous practice. On the other hand, the use of legal jargon in could have affected his performance as he is not a native-English speaker. For this matter, it may be beneficial for the applicant to be tested (and trained if needed) in his English ability as a precursor to the exam. Furthermore, if Mr. Mihaly truly had language difficulties with the NPPE exams, he should have dealt with these concerns in a more effective manner rather than complaining to the human rights tribunal.

We therefore believe that that the human rights tribunal did not establish sufficient reasoning to accuse APEGA of discrimination. APEGA's actions in the years were not designed to single out Mr. Mihaly and his place of origin, but a necessity to eliminate the risk of granting a license to an individual who may not comply with the ethical and legal standards of the profession. One can argue that the information that APEGA relies on to make accreditation decisions is limited and can be more comprehensive if the CEAB and other responsible international organizations can establish a more detailed investigation into foreign universities and their programs. That being said, an immigrant must always understand and adhere to the policies of another country before moving there. Mr. Mihaly should have understood that there were many other people



who had to go through the same process as him, and that there were no exceptions to the rules.

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