

ENGG 513 - The Roles and Responsibilities of a Professional  
Engineer  
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Case Study: APEGA vs Mihaly

Cases: 2016 ABQB 61, AHRC S2008/12/0294

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## Introduction

This report examines the decisions made by the Court of Queen's Bench of Alberta involving APEGA, the Alberta Human Rights Commission, and Mr. Ladislav Mihaly. The details of this case can be found in the case 2016 ABQB 61. The foreign engineer filed a complaint with APEGA, alleging that the application requirements for professional engineers in Alberta constituted discrimination under his foreign-trained background. It was determined by the Alberta Human Rights Commission that the complaint was valid. As such, Mr. Mihaly was awarded with \$10,000, and his application had to be reconsidered. This decision was reversed by the Court of Queen's Bench later, and Mr. Mihaly's appeal of restoration was dismissed by the Alberta Court of Appeal. In addition to analyzing the process and decisions made by the three bodies, this report identifies the key stakeholders, summarizes the cases and examines the decisions assessed. The requirements to become registered as a professional engineer and APEGA's regulatory processes are examined through a legal prism with a focus on the nature of discrimination under such a legal process.

## Stakeholders

A stakeholder is someone who is a part of or affected by course of action [2]. The stakeholders in Alberta Human Rights case S2008/12/0294 and the Court of Queen's Bench Appeal 2016 ABQB 61 are those organisations or individuals that were directly involved in the case or those who would have been affected the by decisions of these cases. A description of stakeholders and their 'stake' are listed below.

- **Association of Professional Engineers and Geoscientists of Alberta (APEGA):** APEGA was established under the Engineering and Geoscience Professions Act to license professional engineers and geoscientists, set standards related to the profession and deal with complaints [4]. APEGA in the initial cases is the defendant; under their regulatory role, APEGA required Mr. Mihaly to pass a set of confirmatory tests among others to prove his knowledge in the engineering field. However, APEGA had a complaint filed against them by Mr. Mihaly alleging discrimination in said testing. The results of these cases affect APEGA's ability to fulfil its' role in regulating the industry and ensuring the safety of the public. Had the court decision resulted in APEGA losing, it could have set a precedent regarding testing limiting APEGA's ability to determine the competency of applicants.
- **The Alberta Human Rights Commission (AHRC):** The AHRC was established under the Alberta Human Rights Act to reduce discrimination [3]. The AHRC hears complaints related to discriminations and provides settlements or decisions through tribunals and hearings. Mr. Mihaly filed a complaint against APEGA stating that the competency exams discriminated against him based on his place of origin. The AHRC found in it's decision that Mr. Mihaly had been discriminated against and awarded him 10,000\$ and required APEGA to reconsider his application.

- **The Court of the Queen's Bench (ABQB):** The Court of Queen's Bench is the Superior Trial Court for the Province, hearing trials in civil and criminal matters and appeals from decisions of the Provincial Court. In this case, the court received the appeals from Mr. Mihaly and APEGA since both of them were not satisfied by the decisions of AHRC. ABQB eventually reversed the decision that AHRC made earlier for this case.
- **Mr. Ladislav Mihaly:** Mr. Mihaly was the pursuant of the case against APEGA in the AHRC; he accused APEGA of discriminating against his engineering certifications based on place of origin. Upon his arrival in Canada, he was required to pass the NPPE and confirmatory tests to receive his P.Eng license. However, he failed and/or did not appear multiple times; he then pursued a case against APEGA in the AHRC. This case was then appealed to the Court of the Queen's Bench resulting in a dismissal of the case resulting in a victory for APEGA. He appealed once more to the Alberta Court of Appeals; however, his file was dismissed again.
- **The Public:** It is under APEGA's jurisdiction to determine "whether any detriment to the public" would come from licensing an applicant [1, s 32(e).] The public is directly affected by licensing decisions due to the impact of any engineering work a licensee may approve or design. In this case, a decision to license Mr. Mihaly could have resulted in Mihaly doing engineering work incorrectly, if APEGA's assertion that he did not meet necessary competency standards was true, thus potentially harming members of the public.
- **Other Foreign Certified Engineers:** The court case and the initial appeal could have paved a precedent for other foreign certified engineers to appeal against their own testing requirements from APEGA. At the very least, regardless of the result, other foreign certified engineers gain more knowledge of what sort of behaviour with regards to APEGA's competency testing would constitute discrimination and under which grounds, these engineers themselves could appeal to the AHRC.
- **Engineers Canada:** Engineers Canada negotiates mutual recognition agreements and other systems of accreditation for foreign programs. Its knowledge or lack of foreign programs influences the requirements for foreign engineers to take technical exams for deficiencies in academic knowledge. Additionally, any accommodations required by APEGA might have a knock on effect on Engineers Canada as it negotiates many of the engineering related international agreements.

## Background

Mr. Mihaly was an engineer that held a Master of Science diploma (Bratislava, 1975) and Corrosion Engineering Certificate (Prague, 1981). He applied to APEGA for registration as a Professional Engineer after immigrating to Canada in 1999. As requested by APEGA, he was asked to write the National Professional Practice Exam (NPPE) but failed three times during the period of May 1999 to August 2003. Later in 2007, the Board of Examiners also determined that he needs to get one-year D level Canadian engineering experience besides the exam completions.

On August 5, 2008, Mr. Mihaly filed a complaint with the Alberta Human Rights Commission, pursuant to the Alberta Human Rights Act, RSA 2000, c A-25.5 [AHRA], alleging that APEGA denied his application based on the discrimination of his place of origin [8].

### **Alberta Human Rights Commission (AHRC)**

AHRC received Mr. Mihaly's complaint. As Mr. Mihaly stated, APEGA denied his application due to his failure of the NPPE which he alleged was based on discrimination of his country of origin, the Slovak Republic. Upon the analysis based on the evidence of the complainant and the respondent, AHRC determined that Mr. Mihaly was succeed in establishing that the examination and experience standard that APEGA was employing, constituted the discrimination issue as Mr. Mihaly addressed [8]. AHRC also stated that, the Fundamental of Engineering exam was a one size fits all approach without taking consideration their actual knowledge and experience, and APEGA need to show that the examination standard using the Fundamental of Engineering exam to test candidates' competency was reasonably necessary for them to practise as professional engineers in Alberta [8]. Meanwhile, APEGA failed to offer any alternative options or helpful assistance for his failure three time failure of the exam. Therefore, the complaint was found to be valid with the Alberta Human Rights Act 32(1), (2) and (3) provided [8]. AHRC made the decision of awarding Mr. Mihaly with \$10,000 and asking APEGA to reconsider Mr. Mihaly's application on February 6, 2014. Both parties were not satisfied, and brought it up to the Court of Queen's Bench for appeal [8].

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

The Court of Queen's Bench reviewed the Tribunal Decision and heard the appeal in July 2015. The Court determined that the standard confirmatory exam was assigned as Mr. Mihaly's work experience did not meet the required responsibility and complexity level [7]. As for the alternatives that AHRC recommended, APEGA already had given him the option of writing the FE exam instead of the confirmatory exams. The court disagreed with the Tribunal decision as it had not shown evidence that APEGA's policies had been discriminatory towards engineers with foreign qualifications [7]. The court agreed on the characteristics that Mr. Mihaly had, which proved that "he was protected from discrimination (place of origin), and experienced an adverse impact (writing exams)" [7], however, it was insufficient to prove that Mr. Mihaly's failure of these exams was due to the place of origin. Plus, there were other irrelevant significant factor as long time junior position experience. The court thought that APEGA's policy of assigning the confirmatory exam is consistent with the Engineering and Geoscience Professionals General Regulation and the objective of ensuring the competency of professionals [4]. Mr. Mihaly's appeal was dismissed as there was no evidence shown that his international education background would hinder the completion of the FE exam; as well as the undue hardship APEGA would have faced had it provided individualized assessment. Mr. Mihaly appealed again to the Albert Court of Appeal for the decision in February 2016.

## **The Alberta Court of Appeal**

The Alberta Court of Appeal dismissed Mr. Mihaly's request on January 12, 2017. Since "the appellant does not point to any patent error on the face of the decision under appeal" [9]. The appeal was filed on time in February 2016, but it was struck to file the Appeal Record due to the absence of further supportive evidence. By referring to *Al-Ghamdi v Alberta*, 2016 ABCA 324, that he lacked "an explanation for the defect or delay which caused the appeal to be taken off the list" [9] for the delay in perfecting the appeal till December, and he did not meet other factors to restore his appeal as well. The Alberta Court of the Appeal confirmed the fairness of the assigned exam, as "even Canadian educational institutions must demonstrate the equivalency of their programs, and Canadians who receive foreign training must also demonstrate equivalency" [9]. They also pointed out that APEGA did not violate any international obligations as per Agreement for Cooperation in Higher Education and Training, and the 1979 UNESCO Convention on the Recognition of Studies, Diplomas and Degrees concerning Higher Education in the States belonging to the Europe Region [9]. Therefore, the restoration of the Appeal was failed.

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

After the initial complaint to the AHRC which resulted in victory for Mr. Mihaly, awarding 10,000\$ in damages and required APEGA to reconsider Mr. Mihaly's application with a more individualized standard of assessment. Upon this result, APEGA appealed against the result citing various issues with the case described later and Mr. Mihaly appealed requesting more damages for lost wages.

After reviewing the Tribunal's case, the ABQB decided for the appellant, APEGA, and dismissed the complaint. This result also resulted in Mr. Mihaly's cross-appeal requesting an increase in damages being dismissed as the *prima facie* discrimination was no longer justified. The court found that the Tribunal failed to correctly determine *prima facie* discrimination in relation to the NPPE exams and the requirement for Canadian experience [7 s 109]. This alongside the Tribunal's incorrect assessment of the APEGA's requirements being unjustified resulted in the appeal being decided for APEGA.

APEGA in its appeal brought up four issues [7 s 54]. These issues were:

- Procedural fairness, whether the Tribunal had treated both parties fairly when it made decisions without consulting both parties.
- Jurisdiction, whether it was within the Tribunal's jurisdiction to equate discrimination based on location of education with place of origin.
- *Prima facie* discrimination, did the Tribunal follow the correct legal procedure and apply it to determine whether Mr. Mihaly had faced *prima facie* discrimination?
- Justification, did the Tribunal find correctly that APEGA's registration requirements were unreasonable.

With regards to procedural fairness, APEGA argued that the Tribunal had been unfair by basing its decision on grounds that neither APEGA nor Mr. Mihaly had brought up. In the original

complaint, the Tribunal had examined the section of the Engineering and Geosciences Professional General Regulations (EGPR) related to the assignment of confirmatory examinations and it used said information to support its conclusion regarding discrimination. The ABQB found that the Tribunal's reference to s 8 of the EGPR was not a tangential reference but used in the reasoning that led to the Tribunal's decision that discrimination had not been justified.[7 s 58.] As such it did not constitute a breach of rules and neither was APEGA through the process restricted in its ability to respond and examine submitted evidence. The ABQB based on this determined that APEGA had not established a breach of the rules in procedural fairness.

APEGA's second issue was in the Tribunal's determination that discrimination based on location of education was, in this case, equivalent to discrimination based on place of origin; the former is not protected AHRA and APEGA claimed that the Tribunal had overstepped its bounds in determining the equivalency. APEGA brought up the *Grover v Alberta* [7 s60] in its appeal, in *Grover* the commission had determined "there was no connection between the complainant's place of origin" and the location where she had received her degree (the basis of discrimination) [7 s 68]. However, the ABQB determined that the *Grover* decision was limited to specifics of that case and that the Tribunal's use of the Moore test was correct. The ABQB found that the Tribunal did not lack jurisdiction.

APEGA then raised the issue of whether the Tribunal had correctly determined *prima facie* discrimination. The correct test for *prima facie* discrimination is the Moore test, under it the complainant must show they have a protected characteristic; that they experienced an adverse impact; and that the characteristic was a factor in the impact. The ABQB agreed with the Tribunal in finding that Mr. Mihaly had suffered an adverse impact in having to write the examinations; the court agreed with the Tribunal in that the resources and effort required to prepare was in itself an adverse impact [7 s 78.] Additionally, the Tribunal found that Mr. Mihaly's treatment due to his education in Slovakia was in equivalent to treatment based on place of origin. The ABQB found no issue with this conclusion. However, the ABQB found issue with the third aspect of Moore's test as the Tribunal did not reference evidence when it found that APEGA's policies were based on discriminatory assumptions; in fact APEGA's discriminatory policy of requiring testing was based on a lack of knowledge and thus no assumptions. The ABQB nonetheless did conclude that Mr. Mihaly's place of origin was a factor in the adverse impact as there was no method to avoid the FE/confirmatory exams barring being educated elsewhere [7 s 103.] However, this conclusion isn't sufficient for discrimination because Mr. Mihaly's origin did not directly impact his requirement to pass the NPPE and fulfill the one year required Canadian experience. Based on the failure to apply Moore's test in relation to NPPE and the Canadian experience requirement, the ABQB found the *prima facie* discrimination unreasonable [7 s 109.] Therefore, Mr. Mihaly faced *prima facie* discrimination with regards to the technical exam but not the NPPE or the Canadian experience requirement.

The final issue that APEGA raised was that under the AHRA, discrimination is said not to have occurred if the discrimination is reasonable and justifiable in the circumstances. The Meiorin test is used to determine if a policy was justifiable. It requires that the policy be rationally connected to the function; that the policy is necessary for the fulfillment of the goal and that accommodations cannot be made without undue hardship. The issue is primarily whether

APEGA reasonably accommodated Mr. Mihaly as the Tribunal correctly applied the test for the first two elements. As mentioned prior, as the NPPE and Canadian experience requirements were not *prima facie* discrimination; the Tribunal's recommendations regarding them are outside their scope. The ABQB found that the Tribunal's recommendations would have placed undue hardship on APEGA as it would have required significant resources such as the "appointment of a committee" to assess and provide assistance, especially if this was required for all foreign applicants. Additionally, the ABQB found that the Tribunal failed to consider the effect of such accommodations on APEGA's regulatory role [7 s 147.] Also, the ABQB found that APEGA did provide a degree of individualized assessment with requirements Mr. Mihaly did not meet but neither did he internally appeal [7 s 140.] The ABQB found that APEGA had provided enough evidence to establish that its discrimination was reasonable and justified.

Thus even though Mr. Mihaly had been discriminated against with respect to the knowledge exams, FE/confirmatory, APEGA was reasonably justified as the other options would have been too resource intensive.

## Reflection and Opinion

I agree with the decisions of the Court of Queen's Bench and the Alberta Court of Appeal. The key point in this case is that APEGA did not make the exam in a way that the candidates with foreign-trained experience would have difficulty in its completion. As stated [7], the NPPE examination and experience standards that APEGA employed has nothing in favour of Canadian or international educated candidates. It is standardized in that all candidates applying to the organization have to satisfy these requirement.

APEGA is a professional association that regulates Alberta's practices of engineering and geoscience under the Engineering and Geoscience Professions Act [4]. Legally, APEGA has the disciplinary power of protecting the public by ensuring that practitioners are competent [5]. Even though Mr. Mihaly experienced a hardship while passing the exam, it should not compromise the regulation and standards of Alberta engineering discipline. APEGA agrees that, "public safety and the public interest are paramount in all decisions regarding the professions" [4]. If Mr. Mihaly's application was granted, then it may be potentially harmful to the public and his employer as he would not be able to perform the essential duties of a professional engineer but he would have been licensed yet incompetent. In that case, APEGA would not be able to protect the public regarding the potential professional misconduct and incompetence that he might have. Hence, APEGA was right when it comes to maintain the professional standards. It must protect the professions of the organization, along with the rights and honors of the people inside as a self-regulating profession [4].

To be able to earn the right to practice and work under the engineering titles and designations, applicants must meet the APEGAs standards for ethical, professional and technical competency [4]. Mr. Mihaly demonstrated incompetency by not passing the NPPE test. In addition, he did not try his best but was absent in another two registered exams, and blamed APEGA's professional

standards for his application failure. When appealing to the Alberta Court of Appeal, Mr. Mihaly did not provide further evidence and explain the delay as requested.

However, it was a fact that Mr. Mihaly did not receive enough assistance in his case of dealing with the exam failure. I agree with AHRC for realizing the fact that there are difficulties for immigrants to meet certain requirements and some of them might restrict the ability of immigrants to work in their professions. The FE exam was taken as an option of alternatives for the confirmatory exam by the Court of Queen's Bench. This is not appropriate as there is no evidence shown that the FE exam was easier or more suitable for Mr. Mihaly's situation.

APEGA should and needs to accommodate foreign-trained engineers and geoscientists without compromising its profession. As a self-regulating association, APEGA should help the professional engineers to serve the public interest under Alberta engineering and geoscience. [4] As discussed in part of its statement, APEGA also share a commitment to "encourage a business culture of belonging, inclusion, and diversity for equity within the engineering and geoscience professions." [4] The immigrant role is not negligible in the working place. As of 2016, the 807,800 landed immigrants in Alberta made up 23.8% of the Alberta working age population. [6] Therefore, it is important for the foreign-trained engineers to get recognised by the authority to help with their career development. Also, it would benefit the organization as they would embrace more diversity. APEGA should not lower its standards to recruit members based on their place of education, but it could manage to raise the applicants' competency. In order to do so, APEGA could provide more assistance for candidates who had difficulty in the application process. A counselling department for applications could have been employed in this case to resolve the complaint at the first place. I would also suggest that APEGA to offer some courses to help Mr. Mihaly for the preparation of the NPPE exam.

While Mr. Mihaly's court result in our opinion was the correct one; Mr. Mihaly and other foreign engineers do require more support not only so that they may practice their chosen profession but also so that they may contribute to the benefit of Alberta and the public through their work.



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