

APEGA v. Mihaly
An Analysis

ENGG 513
Prepared for Dr. Dennis Onen

February 16, 2018

Prepared by:
Tom Woodard - 10133114

Introduction

This report examines the 2016 Court of Queen's Bench decision *APEGA v. Mihaly*. This case is the appeal of an Alberta Human Rights Tribunal ruling from 2014. The Tribunal case, *Mihaly v. APEGA*, was brought by Mr. Ladislav Mihaly in 2008. Mr. Mihaly had applied for registration with APEGA, and as the graduate of a foreign institution had been assigned confirmatory examinations. He had also been assigned the National Professional Practice Exam (NPPE), required of all engineers registering [1].

Mr. Mihaly never completed the confirmatory examinations and failed his NPPE test three times. Following his third failure, and apparently frustrated with the requirements imposed, he filed a complaint with the Alberta Human Rights Commission (AHRC). He was initially successful, the AHRC directing APEGA to provide Mr. Mihaly with significant assistance [1]. However, this decision was reversed on appeal by the Court of Queen's Bench [2]. Mr. Mihaly's appeal of the Court of Queen's Bench reversal to the Court of Appeal of Alberta lapsed, and his application to restore was rejected [3]. This ended the issue in APEGA's favour.

The Court of Appeals Decision affected more associations and individuals than APEGA. The different stakeholders in Mr. Mihaly's case will be examined. An overview of the complaint history in Canada's Court System will be provided. Finally, the merits of Mr. Mihaly's complaint and the two, court decisions will be discussed, as well as APEGA's role regarding foreign engineers.

Stakeholders

APEGA

The Association of Professional Engineers and Geoscientists of Alberta (APEGA), is the governing body for engineers and geoscientists in Alberta [4]. APEGA operates under the authority of the Engineering and Geoscience Professions Act (EGPA). The act gives APEGA the authority to determine the standards for registration as a Professional Engineer. The act explicitly mentions education and experience, but also includes "The Council may make regulations ... respecting the eligibility of applicants generally for registration to engage in the practice of engineering or geoscience..." [5, p. 22]. The Engineering and Geoscience Professions General Regulation, an Alberta Regulation derived from the act, details the specific requirements that APEGA has set for registration as a Professional Engineer. These requirements include, among others, lawful permanent residence in Canada, four years of experience, and knowledge of the Engineering Act [6]. Substantial portions of the requirements laid out in the regulation precipitated the Human Rights complaint [1]. Following the AHRC decision, APEGA was the appellant in *APEGA v. Mihaly*.

The Court of Queen's Bench

The Court of Queen's Bench is the superior court of Alberta. The Court of Queen's Bench has greater precedence than the Alberta Provincial Court and is exceeded in precedence by the Court of Appeals [7]. The court consists of a Chief Justice, an assistant Chief Justice and 74 other

justices. The Court of Queen's Bench can try any indictable criminal offence, it typically only tries serious criminal offences. The court hears civil proceedings when the amount exceeds \$50,000.00 and civil appeals from provincial court. Additionally, as a court of inherent jurisdiction, the court hears appeals of provincial administrative tribunal decisions [8]. Inherent jurisdiction is the doctrine that a court may hear any matter where it is not limited by statute or rule. This jurisdiction descends from the Magna Carta and is an important link to Canada's Imperial past [9]. As a court of inherent jurisdiction, the Court of Queen's Bench heard APEGA's appeal of the Alberta Human Rights Commission Decision.

The Alberta Human Rights Commission

The Alberta Human Rights Commission is a commission established by the government of Alberta through the Alberta Human Rights Act (AHRA). The Act exists to protect Albertans from discrimination - as defined in the Act. The Human Rights Commission is established to enforce the provisions of the AHRA [10]. Members of the commission are appointed by order in council. The commission participates in outreach and education efforts to as part of its efforts. The Commission accomplishes its core mission through a tribunal that hears human rights complaints and adjudicates settlements [10]. As an administrative tribunal, decisions of the Human Rights Commission are subject to judicial review upon appeal [11]. When APEGA appealed the Commission's ruling regarding the initial complaint, the commission was listed as a respondent.

Mr. Ladislav Mihaly

Mr. Ladislav Mihaly is an émigré to Canada from the former Czechoslovakia (now the Czech and Slovak Republics). He was educated at the Slovak Technical University in Bratislava and the Institute of Chemical Technology in Prague. At these institutions he earned a M.Sc. and Certificate of Corrosion Engineering respectively [1]. Upon immigration, he applied for membership in APEGA. Given that neither educational institution had entered into an agreement with APEGA, he was assessed confirmatory exams in addition to an English proficiency and ethics exam. Having experienced difficulty with these exams, he filed a human right complaint against APEGA, alleging discrimination based on place of origin [1]. Initially successful, he was a respondent, along with the AHRC, before the Court of Queen's Bench.

Law Society of Alberta

The Law Society of Alberta is the regulatory body for Alberta's Legal profession. The Law Society focuses on ensuring professional and ethical conduct in the legal profession [12]. The Law Society is established by the Legal Professions Act. This Act gives the Law Society powers to regulate the practice of the legal profession [13], similar to the powers given APEGA by the EGPA. The law society sets competency and experience requirements for lawyers, and ensures completion of continuing education [13]. As the regulator of a profession, the Law Society had an interest in the outcome of the Alberta Human Rights Tribunal [14]. This led the society to file a brief as an intervener in APEGA's appeal to the Court of Queen's Bench.

Engineers Canada

Engineers Canada is the organization that joins the individual provincial and territorial engineering associations. Each association has membership on the board of Engineers Canada. Engineers Canada holds the trademark on the titles “Engineer”, “P.Eng.” and others [15]. Engineers Canada also performs functions on a national level for the engineering profession. These functions include running the Canadian Engineering Accreditation Board (CEAB) [4], which certifies that university engineering programs meet an educational standard. Engineers Canada also negotiates agreements with other national organizations/jurisdictions for reciprocal recognition of engineering professionals and maintains a database of foreign educational institutions and their equivalency [4].

Court of Appeal of Alberta

The Court of Appeal of Alberta is the highest court of appeal in Alberta [16]. The Court hears criminal and civil appeals. A successful appeal rests on grounds of legal or factual error, as the court does not re-try cases [11]. The Court is made up of one Chief Justice and sixteen Justices. All Justices are appointed by the Federal Government on the recommendation of a provincial advisory committee [17]. Following the ruling delivered by the Court of Queen’s Bench, an appeal was made to the Court of Appeal of Alberta.

Background

Mr. Ladislav Mihaly immigrated to Canada 1999. He applied for registration as a Professional Engineer (P.Eng.) and submitted his educational background and references to APEGA in support of his application. As described previously, he had earned two M.Sc. Degrees and had sufficient years of work experience to meet the requirements laid out by APEGA. In support of his work experience, he provided the information of three previous supervisors. After receipt of his application, APEGA informed Mr. Mihaly that he needed to supply further documentation, and would be required to write the NPPE [1]. The NPPE is required of all applying for registration as a P.Eng. [4].

APEGA conducted a review of the additional documents application and made the following determinations:

- His degree was broadly equivalent to a Bachelors in Chemical Engineering,
- His references were from supervisors with limited exposure,
- His experience was narrow in scope [1].

Based on these findings, APEGA communicated to Mr. Mihaly that further examinations would be required. In addition to the NPPE previously stipulated, three confirmatory examinations were assigned, to be taken by May 2001. An engineering economics course or proof of passed exam was also required. APEGA also informed Mr. Mihaly that he had failed his first attempt at the NPPE, which he had undertaken after his first communication with APEGA [1].

Mr. Mihaly proceeded to register for a second attempt at the NPPE. He did not attend this session, and did not write his confirmatory examinations by the prescribed deadline. After the

May 2001 deadline had passed, APEGA informed Mr. Mihaly that his application had been canceled.

Following this first cancellation, Mr. Mihaly applied for reactivation and again failed to write his examinations. This happened twice, with applications for reactivation occurring in 2002 and 2006. Throughout this, Mr. Mihaly communicated with APEGA and in one instance expressed surprise that APEGA would not treat his engineering education as equivalent to that of a Canadian engineering education. APEGA informed Mr. Mihaly that he had a right to file an appeal regarding consideration of his experience – ten years of sufficient, varied experience of increasing responsibility can qualify an engineer for registration as a P.Eng.. An appeal was never filed. [1]

Following a failure to write the confirmatory examinations (or the Fundamentals of Engineering Exam as an acceptable substitute [1]) for a third time, Mr. Mihaly filed a complaint with the AHRC in 2008. This complaint was predicated on Sections 4, 7 and 9 of the AHRA [1]. These sections prohibit discrimination by service providers, employers and occupational association based on, among many criteria, place of origin.

The Tribunal ruled that the complaint has standing under Sections 4 and 9 of the act. The Tribunal also dismissed APEGA's argument concerning jurisdiction, citing previous jurisprudence. Having dealt with the administrative issues, the tribunal heard evidence from Mr. Mihaly and from representatives of APEGA. The tribunal then completed an analysis of the presented evidence and determined that Mr. Mihaly had established a prima facie case of discrimination [1]. This having been established, APEGA had a burden "to justify the conduct or practice" [1, para. 182] which had led to this result.

Assessing this, the tribunal found that while APEGA had adopted the standards in good faith and the standards were rationally connected to APEGA's function, they were not reasonably necessary [1]. The tribunal found that APEGA had discriminated against Mr. Mihaly through the Educational and Experience standard. The Tribunal assessed remedies which involved personalized support for Mr. Mihaly, financial compensation for damages, and a requirement to institute far-reaching changes to the procedure for assessing foreign educational credentials [1].

APEGA immediately appealed this decision to the Court of Queen's Bench. Concurrently, Mr. Mihaly cross-appealed the tribunal's decision not to award lost wages. Along with APEGA's appeal, the Law Society of Alberta filed a brief with the Court as an intervener. The Court held hearings on the appeals July 24 and 25, 2015 [2].

APEGA raised the following four issues in its appeal:

- Procedural fairness,
- Jurisdiction,
- Prima facie discrimination,
- Justification [2].

The Court determined that the Tribunal had not erred regarding the first two issues. The Court found that Tribunal had not reasonably established a case of prima facie discrimination regarding

the NPPE and experience requirement. Discrimination was established regarding the confirmatory examinations. Regarding justification, the Tribunal's "...conclusion that APEGA had failed to justify these requirements under s.11 of the AHRA was unreasonable." [2, p. 26]

Having made the above determinations, the Court reversed the tribunals decision. With the Tribunal's decision reversed, Mr. Mihaly's cross-appeal for lost wage damages was dismissed.

Following APEGA's success on appeal, Mr. Mihaly appealed the Court of Queen's Bench decision to the Court of Appeals of Alberta. He filed his appeal February of 2016. He then allowed his appeal to lapse by failing to file the appeal record. Mr. Mihaly then filed an application to restore the appeal [3].

Mr. Mihaly's application to restore was considered by the Court using a five-part test. Mr. Mihaly met none of the four appellant requirements laid out for restoration of his appeal [3]. The fifth part, lack of prejudice to the respondent, militated in APEGA's favour, as the original complaint had been filed eight years previously. Therefore, the Court dismissed the application for restoration of appeal [3].

The Court of Queen's Bench Decision

As an appellant, APEGA had the burden of identifying specific, legal or factual errors made by the tribunal [11]. If the Court of Queen's bench determined that such errors had occurred, the Court could reverse or modify the tribunals decision or order a new hearing. APEGA appealed the ruling of the Human Rights Tribunal on four separate issues [2], which will be examined in detail.

Procedural fairness

APEGA held that the tribunal breached procedural fairness. APEGA argued that the Tribunal's reliance on Section 8 of the EPGR when assessing the impact of the prescribed exams ignored important language contained in the section. Further, Section 8 of the EPGR had not been raised by either party in the hearing. To rely on Section 8 in the decision breached procedural fairness by not allowing APEGA an opportunity to respond to a new allegation [2].

The Court ruled that APEGA had not established a breach of procedural fairness on the part of the tribunal. Established precedent, including that cited by APEGA, held that a breach of procedural fairness occurred when a new issue was raised. In the case cited by APEGA, a landlord was held liable for negligence, when the complaint brought had been breach of tenancy agreement [2]. In this case, the tribunal was not raising a new issue. The issue of discrimination remained, the tribunal was using Section 8 to reinforce his conclusion.

Jurisdiction

APEGA appealed the Human Rights Tribunal's jurisdiction over the determination that discrimination based on place of education constituted discrimination of place of origin. APEGA relied on an existing Court decision to make this argument, *Grover v. Alberta (Human Rights Commission)* [2].

Grover v. Alberta is a Court of Queen's Bench decision that was affirmed by the Appeals Court of Alberta. Dr. Grover is a Canadian educated Ph.D. who filed a discrimination complaint with the AHRC alleging that the University of Alberta discriminated in hiring in favour of American Ph.Ds. The Tribunal declined to hear the case on the grounds that place of origin implied place of birth. This decision was appealed to the Court of Queen's bench, the Court ruled with the AHRC. The decision was further appealed to the Court of Appeals of Alberta, which affirmed the lower court ruling [2].

Grover v. Alberta had been considered by the Tribunal in *Mihaly v. APEGA*. The tribunal ruled that the reasoning applied in *Grover* did not apply in Mihaly's case, as his place of education was inextricably linked to his place of origin. APEGA's contention was that the Court of Queen's Bench ruling in *Grover* was not confined to the matter before the courts [2, p.11] and had established that place of origin was limited to mean place of birth. As Mr. Mihaly's adverse effect was a result of his place of education, the tribunal erred in assessing its Jurisdiction.

The Court rejected this line of argument by APEGA. The Court determined that subsequent rulings had invalidated Grover in this case – "*Grover* is no longer good law" [2, p.12]. The appropriate standard applied was the test developed in *Moore v. British Columbia (Education)*. The *Moore* test only required that Mr. Mihaly prove adverse effect because of a possessed, protected category.

Prima facie discrimination

APEGA also challenged the Tribunal's finding of prima facie discrimination. APEGA argued that the *Moore* test was insufficiently applied, in addition to the three elements discussed earlier; adverse effect, protected category and that the protected category was a factor in the adverse effect; the tribunal should have considered arbitrariness or stereotyping when making its ruling.

APEGA's contention was that the Court of Appeals had imported this requirement in a subsequent decision. However, the Court of Appeals opinion cited explicitly stated that the Court did not want to import into *Moore* a requirement for testing for arbitrariness or stereotyping [2]. The Court's intention was to affirm that the link between the discrimination and the adverse effect could not be a peripheral link. The two must be sufficiently related and arbitrariness or stereotyping could be used to prove this link. Therefore, the Court of Appeals stated that it would not be an error for a tribunal to consider these factors when deciding.

The Court of Queen's Bench agreed with APEGA that there was no arbitrary or stereotypical behavior on APEGA's part. However, the Court disagreed with APEGA on the necessity of including this in the *Moore* test. Therefore, the court denied this argument and agreed with the tribunal reasoning, as it related to the confirmatory testing [2]. APEGA had also advanced the argument that the confirmatory testing could not have had an adverse impact, as Mr. Mihaly never attempted it. The Court rejected this as the burden imposed by the requirement for confirmatory testing was adverse impact.

The Court did however find that prima facie discrimination had not occurred in relation to the NPPE or requirement for Canadian experience. The Tribunal had found substantive

discrimination regarding the confirmatory exams, and then extended this to cover the experience and NPPE requirement. The NPPE and one year of Canadian experience are required for all engineers seeking P.Eng. registration. Therefore, the requirements did not constitute discrimination [2].

Justification

Finally, APEGA appealed, stating that the requirements set for Mr. Mihaly were justifiable exercise of APEGA's function. The AHRA states that discrimination has not occurred if the contravention of the act was "...reasonable or justifiable in the circumstances." [2, p.19] The defendant must meet the following three requirements to pass the legal test for Section 11:

- The standard was adopted for a function or goal connected to the defendant,
- The standard was adopted in good faith,
- The standard is reasonably necessary and modification requires undue hardship. [2, p. 19]

The Court found that the Tribunal had applied the test, and agreed with the Tribunal's findings on the first two parts. The Tribunal found for APEGA on both, as APEGA's function is to safely regulate engineering and the standard was adopted for this reason.

Regarding the third part of the test, the tribunal found, for several reasons, "...that APEGA did not reasonably accommodate Mr. Mihaly." [2, p. 19] The tribunals reasoning was that Mr. Mihaly had not been offered individualized support rather than a standardized test and he should only have been assessed confirmatory examinations to correct "...perceived academic deficiencies..." [2, p. 21].

The Court disagreed on both points. The latter point resulted from a misreading of the EPGR. The former point would have required considerable expenditure on APEGA's part, when the legal standard for employer accommodation requires modification possible without undue hardship on the employer's part. The Court found that the tribunal had grossly underestimated the difficulty and cost of the changes required of APEGA. Additionally, the Tribunal had not considered that these changes would have fundamentally altered APEGAs mandate. Therefore, the Court concluded that APEGA had met the standard set under Section 11 of the AHRA, APEGA's conduct was reasonable and justifiable [2].

Decision

As APEGA demonstrated that they met the exemption laid out in Section 11 of the AHRA, the Court of Queen's Bench reversed the decision of the tribunal. As Mr. Mihaly's cross-appeal was for remedy, and the tribunal decision was reversed, his cross-appeal was dismissed.

Reflection and Opinion

Mr. Mihaly filed his human rights complaint in 2008. It took nine years for the complaint to be completely resolved, the Alberta Court of Appeals finally ending the issue with the 2017 dismissal. The original Tribunal decision, had it stood, would have fundamentally altered the responsibility of not just APEGA, but all associations that self-regulate professions [14]. In

addition to serving as a gatekeeper to protect the public's interest, these associations would have to adopt the role of mentor and coach. Not that these are unnecessary or undesirable roles, but they are roles that fall well outside of the mission and competency of a professional association.

APEGA's Responsibility

The Alberta Human Rights tribunal focused significantly on the suffering and frustration of Mr. Mihaly [1]. This is understandable. Mr. Mihaly suffered because of his decision to move to Canada and subsequent inability to find work. His story, as noted by the tribunal, seemed a familiar one; the foreign professional, locked out of his profession by an unjust and protectionist bureaucracy. This is however, a conclusion that is belied by the facts. As noted in the Court of Queen's Bench decision, 75% of foreign engineers who apply for registration every year are successful, while the other 25% are assigned confirmatory examinations [2].

Rather than focus on Mr. Mihaly's suffering, the Tribunal could have considered the suffering that first prompted the establishment of the profession of engineering. Engineering is a profession where incompetence can have fatal results. The Court of Queen's Bench acknowledges this, and connects this to the accreditation that is required of Canadian Universities. Canadian institutions are required to meet a standard to ensure the safety of the public. This standard is applied through rigorous audits at significant expense [2, 4]. It is impractical to consider that all the thousands of foreign engineering schools could be so examined. APEGA must then meet its duty to the public by examining the graduates of these schools. Therefore, this author wholeheartedly agrees with the Court of Queen's Bench decision.

The Court of Appeals of Alberta was the final stop for Mr. Mihaly's complaint. Given the eight years already expended and the failure of the appellant to indicate any error with the Court of Queen's Bench decision, it is not surprising that the court decided to deny the application to restore.

What is right

Mihaly v. APEGA raised questions regarding APEGA's treatment of foreign-trained engineers. The courts rightly found that APEGA had no legal responsibility to provide additional assistance or individualized examination to foreign-trained engineers [2]. Does APEGA have a moral or ethical duty to do so? It is hard to believe that they do. An organization, corporation, association or individual has an ethical and moral duty to discharge the duties with which they have been entrusted. In attempting to discharge this duty, APEGA ran afoul of the AHRC. Just as APEGA, had a duty to regulate the practice of engineering, Mr. Mihaly bears some responsibility for satisfying the requirements to register as a P.Eng.

But what of the 1500 other foreign-trained engineers who submit to register every year [2]? As stated earlier, 75% are registered with no difficulty or based on length and experience of practice. The remainder are assigned confirmatory examinations or the FE exam. The FE exam has an 80% pass rate [2]. Perhaps foreign-trained engineers are doing just fine without APEGA's, or anyone else's, help.

References

- [1] *Mihaly v. APEGA* (2014). Alberta Human Rights Commission, Edmonton, AB. [Online]. Available: [https:// www.canlii.org/en/ab/abhrc/doc/2014/2014ahrc1/2014ahrc1.html?searchUr lHash=AAAAAQAGTWloYWx5AAAAAAE&resultIndex=2](https://www.canlii.org/en/ab/abhrc/doc/2014/2014ahrc1/2014ahrc1.html?searchUrlHash=AAAAAQAGTWloYWx5AAAAAAE&resultIndex=2)
- [2] *APEGA v. Mihaly* (2016). Court of Queen’s Bench, Edmonton AB. [Online]. Available: <http://www.apega.ca/assets/PDFs/mihaly-decision.pdf>
- [3] *Mihaly v. Apega* (2017). Court of Appeal of Alberta, Edmonton AB. [Online]. Available: <https://www.apega.ca/assets/news-releases/2017-milhaly-court-decision.pdf>
- [4] G.C. Andrews. Canadian Professional Engineering and Geoscience Practice and Ethics. 5th ed. Toronto ON: Nelson Education, 2014.
- [5] Province of Alberta, “Engineering and geoscience professions act”, 2000. [Online]. Available: http://www.qp.alberta.ca/1266.cfm?page=E11.cfm&leg_type=Acts&isbncln=9780779785131
- [6] Province of Alberta, “Engineering and geoscience professions general regulation”, 2014. [Online]. Available: [http://www.qp.alberta.ca/1266.cfm?page=1999_150.cfm&leg _type=Regs&isbncln=9780779781362](http://www.qp.alberta.ca/1266.cfm?page=1999_150.cfm&leg_type=Regs&isbncln=9780779781362)
- [7] Court of Queen’s Bench, “Welcome” 2018. [Online]. Available: <https://albertacourts.ca/qb/about/welcome>
- [8] Court of Queen’s Bench, “Jurisdiction and governance”, 2018. [Online]. Available: <https://albertacourts.ca/qb/about/jurisdiction-and-governance>
- [9] Department of Justice, “How the courts are organized”, 2017 [Online]. Available: <http://www.justice.gc.ca/eng/csj-sjc/ccs-ajc/02.html>
- [10] Alberta Human Rights Commission, “About”, 2012. [Online]. Available: <https://www.albertahumanrights.ab.ca/about/Pages/about.aspx>
- [11] Department of Justice, “The appeal process in Canada”, 2017 [Online]. Available: <http://www.justice.gc.ca/eng/csj-sjc/just/appeal-appel.html>
- [12] Law Society of Alberta, “About us”, 2018. [Online]. Available: <https://www.lawsociety.ab.ca/about-us/>
- [13] Province of Alberta, “Legal profession act”, 2013. [Online]. Available: <http://www.qp.alberta.ca/documents/Acts/l08.pdf>
- [14] Engineers Canada, “63rd Meeting of the chief executive officers group”, 2014. [Online] Available: https://engineerscanada.ca/sites/default/files/ceogroupagendabook_may21-22_2014_0.pdf
- [15] Engineers Canada, “About Engineers Canada”. [Online] Available: <https://engineerscanada.ca/about/about-engineers-canada>
- [16] Court of Appeal of Alberta, “Role and operation of the court of appeal of Alberta”. [Online]. Available: <https://albertacourts.ca/ca/about/role-and-operation>
- [17] Court of Appeal of Alberta, “Justices” [Online]. Available: <https://albertacourts.ca/ca/justices>