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# MIHALY VS APEGA

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## Introduction

The following report concerns a judge who reversed an Alberta Human Rights decision that had found a regulator discriminated against a foreign worker who wanted to be a registered Professional Engineer in Canada.

Mr. Ladislav Mihaly, who was born and educated in Czechoslovakia, had been applying to the Association of Professional Engineers and Geoscientists of Alberta (APEGA) for registration as a Professional Engineer since 1999. The association required Mr. Mihaly to write examinations in order to confirm his educational credentials. After failing three tests and refusing to write the required examinations for re-applying, he filed a complaint with the Alberta Human Rights Commission in 2008. In 2014, the Alberta Human Rights Tribunal ruled the association's evaluation on Mr. Mihaly's qualifications was discriminatory and ordered the association to reconsider Mr. Mihaly's application. The Tribunal also required the association to provide him with a mentor who could give him the necessary guidance and lead him into the engineering profession, assist him with English Language skills, and allow him to network with other foreign engineering graduates having similar challenges.

APEGA's appeal and Mr. Mihaly's cross-appeal were heard by the Court of Alberta Appeal, and the Court of Queen's Bench. It was concluded that the Alberta Human Rights Tribunal's ruling was unreasonable and contained errors. The Tribunal failed to consider the accommodation to Mr. Mihaly's failure could have such impact on APEGA. The Tribunal also failed to consider Mr. Mihaly's obligation to accommodate by improving his knowledge or attempt the confirmatory examinations. Finally, the Tribunal's directions of providing Mr. Mihaly with a mentor for professional guidance, English Language assistance, and network of foreign engineering graduates with similar challenges, was beyond the scope of any discriminatory conduct found.

The Court of Queen's Bench concluded that the decision of the Human Rights Tribunal should be reversed. Mr. Mihaly's cross-appeal that was related to remedy only had not been justified, thus the cross-appeal was dismissed.

## Stakeholders

A stakeholder is an individual or a party that has an interest or concern in an organization, and it can affect or be affected by the organization [4]. The primary stakeholders in this case study were the individuals and organizations that were directly involved or affected by Mr. Mihaly's complaint, which was filed in 2008. The following list states the stakeholders and a brief description of their role in this case.

1. APEGA: An organization that regulates the practice of engineering and geoscience in Alberta pursuant to the *Engineering and Geoscience Professions Act [EGPA]* and the *Engineering and Geoscience Professions General Regulation [EGPR]*. APEGA was

challenged by Mr. Mihaly with the Alberta Human Right Commission in 2008. APEGA was directed to reconsider Mr. Mihaly's application, and provide him with necessary guidance regarding the profession and English Language skills. In 2014, APEGA filed its appeal brief to the Court of Queen's Bench for a reversal of the decision of the Human Rights Tribunal.

2. The Court of Queen's Bench: It is a superior court of civil and criminal jurisdiction [5]. APEGA and Cross-Appellant Mihaly filed the appeal and the cross-appeal to the Court in 2014. The appeal's initial hearing did not proceed on the scheduled day, because the Court requested counsel of the Tribunal to address three legal issues: the impact of this Court's decision in Human Rights Commission, the test for *prima facie* discriminations, and the test for the defense of a *bona fide* occupational requirement [2]. The Court reviewed the appeal, the cross-appeal, and the Tribunal's decision. The Court concluded that the Tribunal's decision was unreasonable and contained errors, thus the Tribunal's decision should be reversed, and cross-appeal was dismissed.
3. The Alberta Human Rights Commission: It is an independent commission of the Government of Alberta, which upholds equality and reduces discrimination [6]. The Tribunal concluded that APEGA's professional engineer application contained inconsistencies and found that Mr. Mihaly had succeeded in establishing APEGA's Examination Standard and Experience Standard for his educational credential assessment [3]. The Tribunal awarded Mr. Mihaly \$10,000 for general damages, and directed APEGA to provide necessary guidance to Mr. Mihaly for entering the profession [2].
4. Mr. Ladislav Mihaly: Mr. Mihaly was born and educated in Czechoslovakia, and graduated from the Slovak Technical University in Bratislava with a M.Sc. Diploma in 1975 [2]. In 1981, he obtained a Certificate in Corrosion Engineering from the Institute of Chemical Technology (ICT) in Prague [2]. After immigrating to Canada, Mr. Mihaly applied to APEGA for Professional Engineer registration in 1999. He failed the National Professional Practice Exam (NPPE), which was to confirm his educational credentials three times, in 2000, 2002 and 2003, respectively [2]. After APEGA reactivated his application for the third time, Mr. Mihaly did not attend the examinations and filed a complaint with the Alberta Human Rights Commissions in 2008. The Tribunal refused to award him damages for loss of income, thus Mr. Mihaly filed a cross-appeal, seeking an award of \$1,000,000.00 and registration with APEGA, or \$2,000,000.00 if not registered as a professional engineer with APEGA [2].
5. Dr. David Lynch: Dr. Lynch was the Dean of the Faculty of Engineering at the University of Alberta, and a member of the Canadian Engineering Accreditation Board (CEAB). He assessed engineering programs within and outside of Canada [2]. For CEAB to determine whether the accredited process was substantially equivalent to the Canadian

process, Canada and some other countries could enter into a Mutual Recognition Agreements (MRAs). Slovakia did not apply to go through the process, thus there was no MRA between Slovakia and Canada [2]. In addition, the Slovak Technical University of Bratislava had not been assessed as a Substantially Equivalent Program.

6. Dr. Gary Faulkner: Dr. Faulkner, as the Chair of APEGA Board of Examiners, testified about the assessment of Mr. Mihaly's application [2]. Mr. Mihaly's Master's degree was assessed to be closer to a Chemical Engineering Bachelor's degree. Mr. Mihaly's work experience in piping design and fabrication did not contain improvement in responsibility or complexity, thus the confirmatory examinations could not be waived [2].
7. Mr. Mark Tokarik: Mr. Tokarik was the Deputy Registrar for APEGA. He provided further evidence regarding the application procedure. He stated that an applicant from a university in Slovakia should first be considered as to whether the institution is on the Foreign Degree (FD) list. If it was, the Fundamental of Engineering (FE) Exam or three confirmatory examinations would be assigned to the applicant. If the institution was not on the list, the FE Exam or five confirmatory examinations would be assigned to the applicant [2].

## Background

Mr. Mihaly, who was born and educated in Czechoslovakia, had been applying for Professional Engineer in Canada since 1999. In May 1999, Mr. Mihaly applied to APEGA for registration as a Professional Engineer for the first time. APEGA reviewed his application and requested his transcripts and assigned him to write the NPPE [2]. On January 17, 2000, Mr. Mihaly attended the NPPE and failed. Later on, APEGA reviewed the requested supporting material from Mr. Mihaly. On February 11, 2000, APEGA responded to Mr. Mihaly and advised him to pass the NPPE and complete three confirmatory examinations and take a course or pass an equivalent examination in Engineering Economics by May 2001 [2]. On May 31, 2002, Mr. Mihaly applied to APEGA for the second time. He wrote the NPPE on July 15, 2002, and failed. On June 3, 2002, Mr. Mihaly again applied to APEGA for the third time, and he wrote the NPPE on January 20, 2003 and failed [2]. On October 18, 2006, based on Mr. Mihaly's request, APEGA had reactivated his file again after his last failed NPPE and requested him for an updated resume and a list of references. On November, 2006, Mr. Mihaly provided this information to APEGA [2]. The Board of Examiners' reconsideration on Mr. Mihaly's application concluded that Mr. Mihaly was still required to complete three confirmatory examinations and a course or examination in Engineering Economics, or the FE Exam [2]. He did not complete the examinations or course.

APEGA is a lawfully formed organization that is pursuant to the *EGPA* and is the professional regulator for the engineering profession [3]. An individual must be approved for registration as a

Professional Engineer, licensee, permit holder or certificate holder pursuant to s.2 of the *EGPA* before practicing engineering [3]. Mr. Mihaly was registered as an Examination candidate, but did not satisfy the conditions to become registered as a Professional Engineer.

On August 5, 2008, Mr. Mihaly filed a complaint with the Alberta Human Rights Commissions alleging that APEGA discriminated against him based on his place of origin on [2].

The Alberta Human Rights Commissions proceeded with the hearing on February 6, 2014. During the hearing, Mr. Mihaly provided evidence of his credential assessment completed by Canadian Council of Professional Engineers and “engineering technologists”. The assessment stated that Mr. Mihaly’s qualifications were acceptable. He also explained that he had 25 years working engineering experience as a professional lead in Czechoslovakia. Dr. Lynch, Dr. Faulkner and Mr. Tokarik are the three witnesses who appeared on behalf of the respondent APEGA. They explained the detailed assessment procedure of determining a foreign applicant’s qualification. They stated that the Slovak Technical University of Bratislava was not on the FD list, the FE Exam or five confirmatory examinations would be assigned to the applicant, and Mr. Mihaly’s degree was assessed to be closer to Chemical Engineering Bachelor’s degree [2]. APEGA further provided their accreditation standard, examination standard, and experience standard. The Tribunal concluded Mr. Mihaly succeeded in establishing the examination standard and experience standard. APEGA was required to provide Mr. Mihaly with a mentor who had similar experience and was able to provide necessary guidance to guide Mr. Mihaly into the profession. The Tribunal also ordered APEGA to direct Mr. Mihaly to resources that would allow him to network with other foreign engineering graduates, and direct him to resources to increase his English Language skills [2].

APEGA filed an appeal brief on November 20, 2014, and Mr. Mihaly, who was self-represented, sent a response statement the same day. Later on, Mr. Mihaly filed the cross-appeal as the Cross-Appellant, and briefs on the cross-response statement were filed by APEGA. The Appeal was initially scheduled for hearing on December 12, 2014, however, the Court requested the Respondent to provide more information regarding the legal issues raised by the Appellant. Further, the Court also requested counsel for the Tribunal to address three legal issues: the impact of this Court’s decision in Alberta Human Right Commission, the test for *prima facie* discrimination, and the test for the defense of a *bona fide* occupational requirement [2]. After the requests were addressed, the appeal hearing proceeded on July 23 and 24, 2015 [2].

During the hearing, there were four issues needed to be addressed. The first issue was about the procedural fairness. To justify whether APEGA requirements were established under *Alberta Human Right Act (AHRA)*, the Tribunal’s decision claimed that to correct the academic deficiency as the purpose of writing the examinations assigned by APEGA was not required or contemplated according to *EGPR* [2]. APEGA responded that the Tribunal neglected the fact that an individual had the option to complete confirmatory examinations or examinations for the purpose of correcting a perceived academic deficiency [2]. APEGA also submitted that they

were not given an opportunity to address, which indicates the Tribunal breached the duty of fairness [2]. The Court concluded that the arbitrator did not act fairly as he did not offer “each side an opportunity to be heard before he reached a conclusion” [2]. The Queen’s Bench Justice June Ross concluded that “the Appellant has not established a breach of the rules of procedural fairness”, since tribunals and courts do not need to hear every point of the law to make a decision [2]. The second issue was regarding the Tribunal’s jurisdiction. APEGA described that based on *Grover v Alberta (Grover)*, AHRA does not protect against discrimination based on the “place of origin of academic qualifications”, thus the Tribunal did not have jurisdiction over Mr. Mihaly’s complaint [2]. Dr. Grover argued that “place of origin” did not mean “place of birth” but “where you came from” [2]. APEGA questioned whether the Tribunal incorrectly decided that it had jurisdiction to arbitrate Mr. Mihaly’s complaint [2]. The Court of Appeal declined to provide any comments regarding the jurisdiction question. The Court of Queen’s Bench acknowledged the *Grover* had lack of broadness and was out of date, and the *Moore* test was under development. Thus, the Court concluded that the Tribunal did not lack jurisdiction [2]. The third issue was about the *prima facie* discrimination. The Tribunal recognized that Mr. Mihaly was treated as a foreign graduate because of where he came from and his education background. The Tribunal claimed that APEGA’s policies were based on discriminatory assumptions [2], however there was no evidence found to prove this. The Court concluded that it was an unreasonable finding [2]. In addition, the Tribunal failed to apply the *Moore* test to relate the NPPE and Canadian experience requirement, and lack of evidence to support the findings. The fourth issue was regarding justification. This issue was about the Tribunal’s claim that APEGA did not accommodate Mr. Mihaly reasonably [2]. Based on the Tribunal’s explanation, the Court concluded that the Tribunal’s decision contained logical errors, and was unreasonable. The findings had lack of supporting evidence [2].

The Court of Queen’s Bench concluded that the decision of the Human Rights Tribunal should be reversed, and Mr. Mihaly’s cross-appeal related to remedy was dismissed.

## The Court of Queen’s Bench Decision

The details of how the decisions were made by the Court of Queen’s Bench are discussed in this section. The four questions raised by Appellant are listed below [2] and each of them had been discussed by the Court of Queen’s Bench:

1. Whether the Tribunal breached the rules of procedural fairness when it made the conclusion without other parties’ opinion.
2. Whether the Tribunal had the jurisdiction to determine the discrimination related to place of origin of education qualification.
3. Whether the Tribunal reasonably and correctly applied the legal test to judge if Mr. Mihaly had demonstrated *prima facie* discrimination.

4. Whether the Tribunal's decision that APEGA's registration requirements were unjustified was unreasonable.

#### Procedural Fairness

A comparable case had been mentioned by APEGA during the hearing. In that case an arbitrator found a landlord did not breach tenancy agreements, meanwhile he was liable in negligence to the tenants [2]. The principle they relied on in *Amacon Property Management Services Inc. v Dutt*, 2008 BCSC 889, 2008 CarswellBC 1423 (*Amacon*) indicated that the issue of negligence was raised by the arbitrator not giving the parties opportunity to make submissions [2]. However, tribunals or courts for that matter, were not required to give parties the opportunity for every point of law to decide a case [2]. Further, APEGA had had opportunities to respond to all of the evidence and submissions, thus the Court concluded that the Tribunal did not breach the rule of procedural fairness [2].

#### Jurisdiction

APEGA relied on *Grover* and submitted that the Tribunal did not have jurisdiction over Mr. Mihaly's complaint regarding the "place of origin of academic qualifications" [2]. The Court concluded that this issue was determined properly by the legal test for *prima facie* discrimination. However, since *Grover* was decided over twenty years ago, its *prima facie* discrimination test had undergone development [2]. The Court explained that discrimination was not only limited to the rules or practices listed in the *AHRA*. The Tribunal had the jurisdiction and correctly applied the legal test to Mr. Mihaly's *prima facie* discrimination case [2].

#### Prima Facie Discrimination

The Court confirmed that the Tribunal applied the correct legal test for *prima facie* discrimination, but the issue was how the legal test was applied [2]. The Court agreed with the Tribunal that APEGA's policies were based on discriminatory assumptions, but the Tribunal did not make reference to the evidence of this finding. The Tribunal's mixed fact, law merit deference, and lack of consideration of the evidence led to a conclusion made by the Court that the finding by the Tribunal was unreasonable [2]. In addition, the Tribunal had observed that Mr. Mihaly was treated as a foreign graduate, because of where he came from and his educational credentials required him to write confirmatory examinations or FE Exam by APEGA [2]. APEGA explained that Mr. Mihaly never wrote the confirmatory examinations or FE Exam, thus the adverse impact towards him was not established [2]. The Tribunal failed to look at the fact that Mr. Mihaly failed NPPE three times, and failed to apply *Moore* legal test in relation to the NPPE and Canadian experience requirements. There was lack of evidence to support the observation [2].

#### Justification

The Tribunal found that APEGA did not accommodate Mr. Mihaly regarding the requirement of writing confirmatory examinations or the FE Exam and the NPPE, and having one year of Canadian experience. The Tribunal had concluded that the NPPE and one year Canadian experience was unjustified, however based on s 11 of the *AHRA*, it was not within the Tribunal's role range observed by the Court [2]. When discussing the issue of the examinations assigned by APEGA were not "for the purpose of correcting a perceived academic deficiency" as "required" or "contemplated" by *EGPR*, the ignorance of the disjunctive "or" led to misunderstanding in the interpretation. The Tribunal did not have familiarity with the *EGPR*, or seek submissions regarding the interpretation of this section [2]. The Court concluded that the Tribunal's interpretation of this section was unreasonable, and the Tribunal's determination that APEGA was required to take a curative approach and was directed to correct a perceived academic deficiency were also unreasonable [2]. The Tribunal failed to appreciate the necessity of having entry level engineering competence for safety practice. In addition, APEGA was ordered to match Mr. Mihaly with a mentor with its best effort. The amount of resources, time, and cost spend on individual assistance can be significantly large. The Tribunal also failed to consider what the impact could have on APEGA once it accommodated and altered its standards. Finally, the Tribunal failed to consider Mr. Mihaly's responsibility of searching possible accommodations [2].

#### Disposition of the Appeal and the Cross-Appeal

The decision of Human Rights Tribunal should be reversed, and there was no need to remit the matter back to the Tribunal. Mr. Mihaly's cross-appeal related to remedy was not justified under *AHRA*, thus was dismissed [2].

### Reflection and Opinion

Based on the case description, I tend to agree with the decisions of the Court of Queen's Bench and the Alberta Court of Appeal and disagree with the Alberta Human Rights Commission's decision. The Tribunal performed the procedure fairly and applied the correct legal test, but how the legal test was applied was the issue.

APEGA was created in 1920's; it has the responsibility to regulate the practice of engineering and geoscience in Alberta. APEGA as the gatekeeper for engineers and geoscientists is to practice safely, the applicants who wish to apply for registered professional engineer or geoscientists must meet APEGA's basic requirements to ensure them having entry-level knowledge, general skills and certain qualities. The general rules of professional licensing are regarding education, experience, knowledge of local practices, language, good character, and knowledge of professional practice and ethics [7]. Applicants from outside of Canada whose English is not their first language may have difficulty with writing or speaking English fluently. It would be reasonable that the applicants attempt to accommodate APGEA's requirements,



because in a professional environment, being able to communicate successfully is the basic standard to construct and complete daily tasks. The Alberta Human Rights Tribunal directed APEGA to help Mr. Mihaly improve his English Language. I find that was an unreasonable order, because this should be Mr. Mihaly's responsibility to adapt to the Canadian culture and language as a new comer, and seek learning opportunities. The Tribunal also directed APEGA to provide Mr. Mihaly with necessary help to guide him into the profession. The Tribunal not only discriminated APEGA's standard by giving them the order, but also neglected the fact that Mr. Mihaly had failed three NPPEs that was one of the basic requirements for Professional Engineer registration. The amount of time, money, resources, and effort spent on individual mentoring could be significantly large. It is not realistic.

According to APEGA the applicants need to have relevant and related engineering work experience, valid references, proof of Canadian citizenship or permanent resident status, competency in written and spoken English, passing grade on NPPE, good character and reputation, and graduated from a university program that is recognized by the Canadian Engineering Accreditation Board (CEAB) or is a related program that APEGA Board of Examiners considers to be equivalent [8]. The above requirements are reasonably generated in order to determine whether a candidate is qualified. Despite Mr. Mihaly never having taken confirmatory exams, FE exam or a course for engineering economics, he failed three NPPEs. This has clearly and rationally concluded that he did not meet the basic expectation and was not qualified to be a Professional Engineer in Alberta.

Finally, APEGA should not accommodate foreign-trained engineers and geoscientists. The laws, code of ethics, and educated knowledge are different between countries. In order to safely and professionally practice Professional Engineer in Alberta, the foreign-trained applicants need to acknowledge and address the discrepancies and deficiencies between Alberta and their place of education.

## References

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