

# **ENGG 513 Case Study Report: Mihaly vs APEGA**

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## Introduction

This report contains a case study regarding a legal battle between the Association of Professional Engineers and Geoscientists of Alberta (APEGA) and Mr. Ladislav Mihaly, an engineer born and educated in Czechoslovakia. Mr. Mihaly filed a complaint with the Alberta Human Rights Tribunal (AHRT) on August 5<sup>th</sup> 2008, under the claim that he was discriminated against based on his place of origin by denying him registration as a professional engineer. This occurred after Mr. Mihaly had thrice failed, and once neglected to show up for, the National Professional Practice Exam (NPPE); an exam that is required of all engineers wishing to become a licensed practitioner in the province of Alberta, as well as a Professional Member [1]. On February 26<sup>th</sup> 2014, the Tribunal found that Mr. Mihaly was successful in establishing that APEGA's policies were based on discriminatory assumptions, and awarded Mr. Mihaly \$10,000 and that APEGA reconsider Mr. Mihaly's application [2]. Both parties then proceeded to file an appeal, and the decision was then made by the Court of Queen's Bench of Alberta (ABQB). The purpose of this report is to gain greater insight into the requirements to become registered as a professional engineer, APEGA's regulatory process, and the legal environment in which APEGA operates.

## Stakeholders

A stakeholder can be defined as “one who is involved in or affected by a course of action” [3].

The stakeholders involved in the Mihaly vs APEGA case study were all people, groups, or organizations that were either directly involved in the case or had potential consequences that would affect them based off the outcome. The stakeholders that will be discussed include APEGA, the Court of Queen's Bench, the AHRT, Mr. Mihaly, self-regulating professions, international engineers, Dr. Lynch, Dr. Faulkner, and Mr. Tokarik.

- APEGA: The Association of Professional Engineers and Geoscientists of Alberta “regulates the practices of engineering and geoscience in Alberta on behalf of the Government of Alberta through the Engineering and Geoscience and Professions Act” [4]. The main regulatory function of APEGA is to license individuals and companies that want to practice engineering and geoscience in Alberta. APEGA had denied Mr. Mihaly his registration of his P. Eng as a result of Mr. Mihaly failing the required NPPE exam multiple times. Mr. Mihaly then filed a complaint against APEGA with the Alberta Human Rights Tribunal for discrimination based off place of origin. They then appealed the decision of the Tribunal that Mr. Mihaly was indeed discriminated against based off of his place of origin, and the case was taken to the Court of Queen's Bench of Alberta.
- ABQB: The Court of Queen's Bench of Alberta is the superior court of Alberta, and operates as a civil and criminal trial court, as well as hears certain appeals from the Provincial Court of Alberta. When the Tribunal's decision on the case was appealed by both parties, it was then taken to the Court of Queen's Bench of Alberta where Honourable Madam Justice J.M. Ross made a final decision on the case.

- **AHRT:** The Alberta Human Rights Tribunal is responsible for the resolution of complaints using the tools provided in the Alberta Human Rights Act. When Mr. Mihaly complained that he was discriminated against by APEGA based on place of origin, the Tribunal was responsible for resolving the complaint. It found that Mr. Mihaly was successful in establishing that APEGA had indeed discriminated against him, based on APEGA's discriminatory assumption that engineers with qualifications from foreign countries are not equivalent to Canadian engineering accreditations. They awarded Mr. Mihaly \$10,000 and for APEGA to reconsider his application; a decision that was later appealed by both APEGA and Mr. Mihaly himself.
- **Mr. Ladislav Mihaly:** Mr. Mihaly is an engineer who was born and educated in Czechoslovakia. In 1999 he immigrated to Canada and applied to APEGA for registration as a professional engineer [5]. He was then advised by APEGA that he would have to write the NPPE, of which he did and subsequently failed. He then registered for the NPPE again, however he did not show up for the examination. The next two attempts at the NPPE exam were also failed by Mr. Mihaly. He then proceeded to file a complaint with AHRT against APEGA for discrimination based on place of origin.
- **Self-Regulating Professions:** Other self-regulating professions such as law, medicine, and dentistry have somewhat similar standards as engineering. As a result, the outcome of the case affected them as well. The court's final decision on whether or not APEGA had indeed discriminated against Mr. Mihaly based on his place of origin would have opened the door for other similar cases for them as well. This would mean that they could also have applicants complaining against them based on the same principles, and would negatively impact their ability to regulate.
- **International Engineers:** Similar to the self-regulating professions, while other international engineers did not partake in the case, the outcome of the case affected them as well. If Mr. Mihaly had been successful, numerous other applicants would file similar complaints against APEGA of discrimination based on place of birth as well. This could have resulted in easier standards and regulations for international engineers trying to register as a Professional Engineer under APEGA.
- **Dr. David Lynch:** Dr. Lynch, a Dean of the Faculty of Engineering at University of Alberta, held a position on the Board of Examiners. He also was a member of the Canadian Engineering Accreditation Board which assesses engineering programs in and outside of Canada. He was the first of three witnesses for APEGA [5].
- **Dr. Gary Faulkner:** Dr. Faulkner, Chair of the APEGA board of Examiners, testified the review of Mr. Mihaly's application. He was the second witness for APEGA [5].
- **Mr. Mark Tokarik:** Mr. Tokarik, Deputy Registrar for APEGA provided evidence on the application process and the review of Mr. Mihaly's application as well. He was the third and final witness for APEGA [5].

## Case Summary

Mr. Mihaly, an engineer born and educated in Czechoslovakia. He had a M.Sc. Diploma specializing in technology of fuels, and thermal energy. They were completed at the Technical University at Bratislava in 1975, and in 1981 he obtained a certificate in corrosion engineering from the Institute of Chemical Technology in Prague [5].

In May 1999 he immigrated to Canada and applied to APEGA for registration as a Professional Engineer. APEGA then notified Mr. Mihaly that they had received his application and requested additional information, as well as letting him know he must write the NPPE. Upon further reviewing Mr. Mihaly's application APEGA's Board of Examiners determined in addition to passing the NPPE, he must also complete three confirmatory examinations and take a course/exam in engineering economics. Mr. Mihaly then wrote and failed his NPPE exam, and was notified by APEGA that his application was withdrawn due to him not writing his confirmatory exams by May 2001 [5].

Mr. Mihaly then asked APEGA to reactivate his application, and expresses his confusion over why his Masters degree from Czechoslovakia wasn't even equivalent to a Bachelor's degree in Alberta. APEGA responded that it was because his degrees were on the Foreign Degree List and the confirmatory exams are to ensure that their education meets APEGA's standards. Mr. Tokarik then told Mr. Mihaly that the reason for the three confirmatory exams was because "there are no Mutual Recognition Agreements in place between Canada and your former country which recognizes the accreditation system in your former country." When Mr. Mihaly complained about this, Mr. Tokarik then sent Mr. Mihaly an Appeal sheet to file an appeal if he wished, to which Mr. Mihaly did not do. Mr. Mihaly then wrote and failed the NPPE again, and again APEGA withdrew his application for not writing the confirmatory exams in time [6].

Mr. Mihaly then asked APEGA to reactivate his application a third time. Once again, he did not write the three confirmatory exams, and proceeded to file a complaint with the Alberta Human Rights Commission against APEGA for discrimination based off place of origin.

On February 14<sup>th</sup> 2014, the Tribunal found that under section 4 and section 7 of the Alberta Human Rights Act, Mr. Mihaly was successful in establishing that the examination and evaluation standards used by APEGA were indeed discriminatory without justification. The Tribunal then awarded Mr. Mihaly \$10,000 in general damages, and for APEGA to reconsider his application. It also included orders that APEGA was to appoint a committee to assess Mr. Mihaly's application on a more individualized basis, which included possible examination exemptions combined with different methods of assessment. Both APEGA and Mr. Mihaly appealed this decision and the case was sent to the Court of Appeals [5].

Since the Court of Queen's Bench of Alberta is the Superior Court of Alberta and can hear certain appeals from the Provincial Court of Alberta, and "the AHRA, in s 37(4), sets out the powers of the Court of Queen's Bench on an appeal decision of a human rights tribunal," the case was sent to the ABQB [5].

The ABQB, under the power of Madame Justice Ross, ultimately decided to uphold APEGA's appeal and reversed the decision of the Tribunal [2]. The court decided that it would be undue hardship to accommodate Mr. Mihaly to the point of altering APEGA's registration process, and would negatively impact their ability to regulate. A further analysis of the reasoning and a more detailed explanation will be discussed in the next section.

## The Court of Queen's Bench Decision

After hearing the witnesses, and assessing all of the evidence, Madame Justice Ross set out the 4 issues in the case as follows:

1. Procedural fairness: Did the Tribunal breach the rules of procedural fairness?
2. Jurisdiction: Was the Tribunal wrong when he held that he had jurisdiction to determine whether discrimination based on place a person receives their education is the same as place of origin?
3. *Prima facie* discrimination: Did the Tribunal use the use and reasonably apply the correct legal test to determine whether Mr. Mihaly had correctly demonstrated *prima facie* discrimination?
4. Justification: Was the Tribunal's decision that APEGA's registration requirements unjustified unreasonable?

First, Justice Ross determined that the Tribunal did not breach the rules of procedural fairness. Second, Justice Ross determined that APEGA was not successful in establishing that AHRT lacked jurisdiction to hear the case. APEGA was looking to rely on a similar case of *Grover vs Alberta Human Rights Commission*, in which the ABQB had decided that the Alberta Human Rights act did not protect against discrimination based on place of origin of academic qualifications. However, Justice Ross decided that the jurisdiction in this case was better resembled by the legal test for *prima facie* discrimination as set out in the previous case of *Moore vs British Columbia (education)* [7].

The majority of Justice Ross's decision was based on whether or not AHRT had successfully concluded that APEGA's registration requirements were unreasonable using the test for *prima facie* as set out by *Moore*. Under the *Moore* test, it was required that AHRT show Mr. Mihaly had a characteristic that was protected against discrimination, and that the characteristic was a factor in experiencing the adverse impact [7].

The court agreed with AHRT's findings in that Mr. Mihaly's place of education was indeed linked to his place of origin, and that his place of origin was a factor in his adverse impact. However, she also highlighted that while AHRT may have found writing the confirmatory exams and fundamentals of engineering exam to be an adverse impact based on place of origin, any disadvantage from being required to write the NPPE and having one year of Canadian experience was not linked to place of origin. She then stated that the evidence of Mr. Mihaly's place of origin being a disadvantage to him in terms of APEGA's requirements was not supported, as she found it unreasonable the AHRT's conclusion that APEGA assumed foreign countries with no

MRAs were not at par with Canadian engineering accreditation standards. Additionally, Justice Ross found that the requirement to pass the NPPE and to have one year of Canadian experience was not found to have an adverse impact on Mr. Mihaly based on place of origin. As a result, only the requirements to write the confirmatory exams or fundamentals of engineering exam were related to Mr. Mihaly's place of origin [7].

AHRT had claimed that the requirements to write the confirmatory exam were discriminatory and unjustified based on two grounds:

1. Mr. Mihaly should only have been required to write exams to correct supposed academic deficiencies after performing an individual assessment of his credentials.
2. That the exams should have been more individualized rather than the standard tests.

Justice Ross determined that the first ground resulted from AHRT's unreasonable interpretation of section 8 of the Engineering Professions General Regulation, which stated that the exams may be confirmatory in nature **or** to correct perceived academic deficiencies. She also stated that APEGA does not have the ability and resources to discuss and negotiate agreements with all of the engineering programs as there are thousands of them. Therefore, the assigned examinations given by APEGA to assess an applicant's quality of engineering program is justified [7].

Justice Ross also determined that there was no evidence that internationally educated graduates would have difficulty passing the FEE and that "the possession of entry level competence is reasonably necessary to safe practice as a professional engineer." As well, individualized testing is considered when an employer can accommodate an employee without undue hardship. While APEGA does individually assess applicants to determine if the exams can be waived, Mr. Mihaly did not meet these requirements for a waiver. The requests that APEGA go even further to assemble a group of successfully integrated foreign engineers to investigate and explore other options for individually assessing Mr. Mihaly's qualifications as well as providing him with a mentor, went "beyond the scope of any discriminatory conduct found or even alleged," and would have required APEGA to alter its standards and act outside of its regulatory role [7].

Justice Ross ultimately decided that AHRT did not take into consideration that Mr. Mihaly never even attempted the confirmatory exams and FEE, and failed to consider relevant factors in the assessment of undue hardship. Therefore, AHRT's conclusion that APEGA failed to accommodate Mr. Mihaly to the point of undue hardship were unreasonable, and APEGA's discrimination was justifiable. Justice Ross then reversed the decision of AHRT [7].

## Reflection and Opinion

In the case of *Mihaly vs APEGA*, the Alberta Human Rights Commission and Mr. Mihaly fought APEGA in front of the Court of Queen's Bench of Alberta to gain additional accommodation for Mr. Mihaly, a foreign trained engineer. Ultimately, ABQB gave victory to APEGA and they were not required to provide Mr. Mihaly with additional accommodations, and the discrimination based on place of origin accusations were dropped.

After analyzing and researching this case, I agree with the decision of ABQB/Court of Appeals, and therefore disagree with the Human Rights Commission. While I understand the necessity and importance of the Alberta Human Rights Commission to ensure Albertan's rights are protected, in this case I believe they requested accommodation to the point of undue hardship on APEGA.

Mr. Mihaly was given a very fair opportunity to register as a Professional Engineer with APEGA. Writing the NPPE and other confirmatory exams is a way of ensuring that the safety of the public is held paramount by ensuring that an engineer is competent enough to practice. That is something that is in the engineering code of ethics and not something to be taken lightly. Therefore, it is not unreasonable to ask Mr. Mihaly to write the exams because he was not educated in a country that APEGA has an MRA with, and ensuring the public's safety through tests of competency is then crucial. It was also stated that there was no evidence that international graduates would have difficulty passing the exams, and that "the possession of entry level competence is reasonably necessary to safe practice as a professional engineer" [7]. Therefore, asking Mr. Mihaly to write these exams do not show signs of discrimination from APEGA towards Mr. Mihaly but rather a duty of APEGA to protect the public's interest.

Additionally, Mr. Mihaly also never even attempted to write the confirmatory exams or FEE, and had his application was withdrawn multiple times for this reason. However, APEGA resubmitted his application every time he requested, and kept on giving him chances to write the exams. The fact that Mr. Mihaly chose not to write the exams is of no fault of APEGA and bears no responsibility on them to further accommodate him and shows no signs of discrimination. When Mr. Mihaly complained about this process, a member of APEGA even gave him an appeal sheet to which he could file, something that he did not do. This all shows that in no way did APEGA discriminate against Mr. Mihaly for being a foreign educated engineer, but instead gave him every opportunity to earn his right to practice as a professional engineer. Hence my agreement with the decision made by the Court of Queen's Bench of Alberta and not the case made by the Alberta Human Rights Commission.

When it comes to APEGA accommodating foreign trained engineers, I believe they currently do a sufficient job in doing so. APEGA already has MRA agreements with countries that they have been able to certify and confirm the competency of their engineering programs. Since thousands of various engineering programs exist across the world, not only would APEGA not have the time and resources to assess every single one, but some programs would fall short of competency standards anyhow. This requires APEGA to confirm engineering competency in other ways, such as exams. To accommodate foreign engineers even further by removing all exams would completely alter the regulatory abilities of APEGA. Additionally, it would not be honoring the engineering code of ethics because allowing engineers to practice in Alberta with confirmation of their competencies would be putting the public at risk.

As well, APEGA currently assess each individual's application on a personalized basis to determine what requirements are needed from the applicant. This would take considerable time and resources, however APEGA does this to try and accommodate foreign trained engineers the best that they can. To ask APEGA to take this process even further by personalizing the requirements of every individual would be unreasonable.

As a result, I believe that APEGA should continue to accommodate foreign trained engineers to the degree that they are currently doing.



## References

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