

Course: EnGG 513

Report on APEGA vs. Mihaly Case Study

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Introduction

The Mihaly versus APEGA case, is a case where a foreign engineer had difficulties passing APEGA's exams to be registered as a professional engineer in Canada. In this case, the foreign engineer filed a human rights complaint as a result. Mr. Mihaly thought APEGA was discriminating towards his place of origin because they required him to write exams which tested his competency, as his credentials were from a foreign country. APEGA had limited knowledge on the standards of Mihaly's engineering program. As a result, APEGA wanted to ensure he was properly trained by having him take their standardized exams. The Alberta Human Rights commission took the matter very seriously and held a hearing for Mihaly and APEGA where they determined APEGA was guilty of discrimination. The case was appealed and another hearing at the court of Queen's Bench determined APEGA was not guilty. The case turned out not to be a true case of discrimination. It was revealed that the tribunal for the Alberta Human Rights Commission construed the evidence and exacerbated the issue. This case was taken very seriously, almost making it to a hearing in the highest court system; the court of appeal. Other professional engineering associations across the country carefully followed the case and used the opportunity to review their own policies.

APEGA

APEGA (Association of Professional Engineers and Geoscientists Alberta) acts as a regulatory body for engineers and geoscientists. It is their legal obligation to ensure engineers and geoscientists are competent and carry out work at a professional level. Their primary role is to protect public interest and safety. All applicants of APEGA must pass the NPPE exam to become a member. This exam tests applicants on their competency as an engineer/geoscientist. APEGA's council is composed of at least 16 professional members which create policies and provide standardization of qualifications. There is also a practice review board of at least 5 members who review the practice of engineers to ensure they are meeting APEGA standards. If the practice review board has suspicion of a licenced member not following regulations, the investigative committee gathers evidence to make a case towards a person. APEGA can then revoke the persons licence and fine the individual given sufficient evidence.

The Court of Queens Bench

The Court of Queen's Bench is the higher court of jurisdiction in Alberta. The provincial courts first determine whether the case should go to the Court of Queens Bench. The federal government appoints justices to this court and it holds trials by judge alone and jury trials for criminal and civil matters. The Queen's Bench Court usually handles serious cases or cases which have been appealed in the provincial courts. There is only one higher court system and that is the court of appeal.

The Alberta human rights commission

The Alberta human rights commission strives to reduce discrimination and foster equality. The director and employees work to resolve and settle complaints under the Alberta human rights act while The Chief of the Commission and Tribunals are responsible for keeping the Minister of Justice and Solicitor General informed about human rights issues. They also appoint members of the group to serve on human rights tribunals that hold public hearings. The commission works to foster equality through public education and community initiatives as well. Anyone who provides services to the public has the responsibility to accommodate individuals under the protected grounds (ex. Place of origin) to the point of undue hardship according to the Alberta human rights act.

Mr. Ladislav Mihaly

Mr. Mihaly was born and educated in Czechoslovakia before he came to Canada. He had a M.Sc diploma with a specialization in technology of fuels and thermal energy from the Slovak Technical University in Bratislava in 1975 and a certificate in corrosion engineering from the Institute of Chemical Technology in Prague in 1981. In 1999 he applied to APEGA for registration where they advised him that he would have to write the National Professional Practice Exam (NPPE). He failed the first NPPE exam he took, did not show up for the second and on his third attempt failed again before filing a human rights complaint.

Moosa Jiwaji

Moosa Jiwaji was the adjudicator in the initial hearing in which APEGA was found guilty for discrimination. Moosa had worked in law for many years and is still a legal consultant for Alberta Justice. At the time of the case he was employed by the Alberta's Human Rights Commission. After heavy scrutiny on his verdict and posting tweets expressing beliefs on Kenya's politics he lost his position in the Human Rights Commission.

Court of appeal

The court of appeal is the highest court system a case can be tried in. This court deals with the most serious matters, including unlawful actions by the government themselves, proving that no one is above the law in this court. This court also deals with the appeals from the court of Queens Bench, given the matters are serious enough. Less serious crimes cannot be appealed from the court of Queens Bench.

JM Ross

JM Ross was the judge at the second hearing. She took a more thorough approach reviewing the evidence and allegations at the second hearing. She made the point of how individualized testing would be costly and inefficient. She also noted that APEGA must have a standardized approach to becoming a member. Her verdict was that APEGA was not guilty of discrimination.

Background

Mr. Mihaly immigrated to Canada from Czechoslovakia and in May 1999 and applied to APEGA to be registered as a professional engineer in Canada. APEGA informed him that to register he would need to pass the NPPE exam, pass 3 confirmatory exams and take an engineering economics course or an equivalent exam.

On Mihaly's first attempt of the NPPE exam he sat the exam but failed. His second attempt was on October 16th, 2000, however Mr. Mihaly failed to even make an appearance. By June 2001 Mihaly's application was withdrawn as he had not passed his exam in the specified time frame. In 2002 he reactivated his file and took the NPPE in January 2003, only to fail the exam again.

After a long period of time he reactivated his application for a third time in 2006 where he was asked to write the same exams. He never wrote the exams and on August 5th 2008 he filed a human rights complaint that APEGA had discriminated him based on his place of origin. Mr. Mihaly wanted APEGA to pay him \$1,000,000 in lost wages and to licence him or pay him out at \$2,000,000 if they would not consider his application.

On February 6th 2014 the tribunal had a hearing for Mr. Mihaly and APEGA and the tribunal determined APEGA had discriminated against Mihaly, by not taking an individualized approach to recognize his credentials. The tribunal did not order APEGA to pay Mihaly for lost wages as he had insufficient evidence to prove his amount of lost wages. The adjudicator Moosa Jiwaji made the final decision and the tribunal ordered APEGA to pay Mihaly \$10,000 and to reconsider his application. The tribunal also wanted APEGA to set him up with a mentor who could gradually integrate him into the Canadian engineering profession. Both Mr. Mihaly and APEGA appealed the case to the court of Queen's Bench.

At the court of Queen's Bench APEGA defended themselves by saying the tribunal had no jurisdiction over Mr. Mihaly's complaint due to the fact that the protected grounds, place of origin does not encompass place of education. In other words, place of origin is different from place of origin of academic qualifications. The court found the tribunal's findings and the facts they brought up in the previous case were not backed up by sufficient evidence and had logical errors in the verdict. As a result the court of Queen's Bench ruled APEGA not guilty for discrimination.

The case was appealed again and was to go to the highest court system, the court of appeal, However Mr. Mihaly did not properly file his application and continued to delay the application process for his appeal. The court dismissed his application and the case never went to trial.

The court of Queen's Bench decision

The Court of Queens Bench is the Superior Trials Court for the province of Alberta. It was tasked with making the final decision in this case. APEGA raised allegations that the 2014 Human Rights tribunal contained errors and that the decision should be reversed. APEGA's issues with this appeal included: Procedural Fairness, Jurisdiction, *Prima Facie* Discrimination and Justification. The Honourable Madam June Ross acted as the judge on this case and made the final decision whether or not to reverse the outcome of the 2014 tribunal.

Procedural Fairness raises the issue that APEGA believed the measures it took to correct the perceived "academic deficiency" were justified and ethical. These measures took place in the form of three standardized tests. The tests were designed to ensure that Mihaly was educated to the standard of Albertan engineers. Judge June Ross (2016) referenced the case of *The Pope & Talbot Ltd. v British Columbia* and decided that APEGA "had not established a breach in the rules for procedural fairness".

APEGA (2016) made a case that the tribunal did not have proper jurisdiction over discrimination regarding "place of origin of academic qualifications". According to APEGA (2016), "place of origin" was not meant to be interpreted as "place of education" rather than "place of birth". Judge June Ross agreed with the tribunals application of the *Moore test* originating from the case of *Moore v British Columbia*. Judge June Ross concluded that the tribunal was correct in deciding that Mihaly's place of origin was to be protected from discrimination. Furthermore, it was confirmed that Mihaly did indeed suffer adverse impacts in the form of the three tests, due to this discrimination. Although Mihaly did not actually write all three tests, the adverse impacts would have taken place in the form of the costs, stress and time associated with writing the tests. Because of this, APEGA's requirement of writing the tests was deemed an adverse impact.

While the two above points remained valid. The judge eventually decided that APEGA was acting correctly and that the tribunal's decision was invalid. This is due to the fact that all applicants are treated equally in regards to origin of academic qualifications. In other words, the court agreed that it was discriminatory on an individual level for Mihaly to be required to write the tests and the tests did have substantial adverse impacts on Mihaly. However, as all applicants were submitted to the same discrimination, no matter where they recieved education, APEGA was in fact protecting Mihaly from discrimination based upon "origin of education". It is considered consistent and justifiable that all applicants are to be subjected to confirmatory exams if they have not yet established their competency to APEGA.

Reflection and Opinion

Mr. Mihaly was a foreign accredited engineer and had completed his degree over fifteen years before he immigrated and was required to write the confirmatory exams. This is most likely the reason he was unable to pass the exams, as his qualifications were out of date and he did not have the skills, rather than his place of origin. APEGA hires many foreign trained engineers and they follow the same process as Mihaly did to register in Alberta without issue. Mihaly also displayed a stubborn attitude towards the registration process, not showing up for exams and refusing to take alternative options provided by APEGA such as the Fundamentals of Engineering exam (FE). After failing repeatedly over an eight year period he was frustrated with APEGA and decided to file a human rights complaint.

The tribunal for the Alberta Human Rights Commission did not use strong evidence in their decision when they convicted APEGA of discrimination. They referenced other cases, in which the court of Queen's Bench found were too distantly related to validate taking similar action. The tribunal's decision that APEGA should also find a mentor to gradually integrate Mihaly into Canadian engineering would have been very resource intensive and caused undue hardship on APEGA as well. The adjudicator, Moosa Jiwaji on the Mihaly case was heavily criticized for his verdict and lost his position with the Human Rights Commission soon after the case.

The court of Queen's Bench reviewed the case and discovered the tribunal's evidence was weak and the verdict was illogical. The duty of the courts is not to impose an artificial interpretation of the words in the legislature, but to approach a case with a fair and liberal approach and make a decision in good faith. The Human rights Commission tribunal did not do so, trying to stretch the protected grounds of place of origin, to place of origin of academic qualifications. The country in which a person took their degree is not a quality that is protected from discrimination, nor should it be as different countries have different standards and practices. Despite APEGA having limited knowledge of his credentials, they were willing to accept him as a member and requiring Mihaly to take some confirmatory exams seemed like a completely reasonable approach to ensure competency.

APEGA already accommodates foreign trained engineers by continuously reviewing the curriculum of foreign degrees to decide on the eligibility of the degree in Canadian engineering. They also give an alternative option to the NPPE exam. Applicants have the option of writing the FE exam used in the United States instead. Although Mihaly felt discriminated by the hardship of writing exams, it is crucial APEGA determines that their members are competent as this is the entire purpose of a self regulating a profession, and an exam is a fair and standardized approach.

Mihaly tried to appeal the court of Queen's Benches decision that APEGA was not guilty of discrimination, but he delayed the appeal and did not follow proper procedures or put in a valid effort to file an application for appeal. The court of appeal therefore dismissed it and the

verdict of the hearing at the court of Queens bench remained. The fact he did not pursue the appeal more seriously showed he did not find the verdict was unfair, or just further proved his incompetence.

Overall this case was blown out of proportion when the tribunal for the Human Rights Commission construed the words of the legislation towards the discrimination of Mihaly. The case would have been closed at the first hearing had the tribunal looked at the evidence and legislation closer, but instead they made a poor final decision which was evident when the case went to the court of Queen's Bench. Mihaly was most likely frustrated with APEGA and as a result wanted to take legal action against them. He was on no grounds to do so and if he had put as much effort into studying for exams as he did defending that he was discriminated against, there would not have been an issue in the first place.

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