

ENGG 513

# Mihaly Case Study

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## Introduction:

This report is a case study on the Court of Queen's Bench decision regarding the case between APEGA, the Alberta Human Rights Tribunal and Mr. Mihaly. In this case The Human Rights Tribunal initially ruled that APEGA was discriminating against Mr. Mihaly. APEGA then went to the Court of Queen's Bench to have the Human Rights Commission's orders reversed because they disagreed with both the ruling and the proposed steps to correct it. The Court of Queen's Bench ruled in favor of APEGA saying that "The Tribunal's reasons leading to his conclusions that APEGA could have accommodated Mr. Mihaly and others sharing his characteristics are rife with logical errors." (Court of Queen's Bench of Alberta, 2016). The purpose of this report is to develop a deeper understanding of APEGA's rules and regulations involved in the process of becoming a professional engineer as well as look at the processes and operating structure of APEGA. This report will cover the major stakeholders in the case and their role in the proceedings, a brief background of the case, the development and conclusion made by the Court of Queen's Bench, as well as my personal opinions and conclusions on the matter.

## Stakeholders:

### APEGA:

The first stakeholder in this decision is APEGA. APEGA is the Association of Professional Engineers and Geoscientists of Alberta, an association that manages and regulates the practices of engineering within Alberta. They are a major stakeholder in this case because as the regulator of engineering practice within Alberta they hold a lot of responsibility for the quality of engineers can practice in Alberta. Depending on the outcome of this case, APEGA could have had to develop new standards and qualifications for engineering which would have resulted in huge costs to the organization or they would have had to lower the bar for entry for professional engineers which could have disastrous consequences.

### The Alberta Humans Rights Commission:

The Alberta Humans Rights Commission was the body initially approached by Mr. Mihaly to file his complaint against APEGA. Their role in Alberta is established by the Alberta Human Rights Act and is to protect Alberta from discrimination. Their mandate reads "to foster equality and to reduce discrimination. It fulfills this mandate through public education and community initiatives, through the resolution and settlement of complaints of discrimination, and through human rights tribunal and court hearings." (Alberta Human Rights Commission n.d.). Ultimately their ruling went in favor of Mr. Mihaly and APEGA was told to correct Mr. Mihaly's situation.

### The Court of Queen's Bench:

The Court of Queen's Bench was the deciding body in the case between APEGA, the Human Rights Tribunal and Mr. Mihaly. The Court of Queen's Bench "conducts criminal matters, civil proceedings (including family and surrogate proceedings) and the judicial review of government and tribunal action in Alberta." (Moreau, n.d.). It was their decision to revert the orders put out

by the Alberta Human Rights Commission and allow APEGA to continue operating as it had been.

#### Mr. Ladislav Mihaly:

Mr. Ladislav Mihaly is a large stakeholder in this case because his life has been directly affected by current APEGA policies. The outcome of this case could have had huge benefits for his life, providing him with a better chance of securing a stable job and the resources to ensure that he enjoyed the benefits he once did being a well-educated individual with qualifications obtained in his country of origin.

#### Foreign Trained Engineers:

This case affects all foreign trained engineers as it had the potential to change APEGA's criteria for acceptance and make it easier to become an engineer in Canada which, depending on their country of origin and previous quality of life, could have had huge life changing benefits. Whether APEGA provided additional support or lowered the bar to entry and moved some of the safety responsibilities to the companies themselves, this decision could have had a huge effect on many foreign trained engineers looking to get registered.

#### Other Regulatory Bodies:

Other Regulatory Bodies were also stakeholders in this case as the result of this litigation could affect future cases within their jurisdiction meaning that they too could incur similar rulings and subsequent cost increases to those directed at APEGA, or the standards required by their respective industries could be reduced.

#### Engineering Firms and Companies:

Engineering firms could also have been affected by this decision because depending on the way that APEGA solves the new requirements, the engineering firms would either face a shortage of new engineers as the process for registration through APEGA became more time consuming and more involved, or an excess of less qualified engineers enter the workplace as APEGA reduces its requirements. Also, to reduce its regulatory role would mean having the engineering firms and the public itself take on the risk, or the engineering firms might be expected to be the ones to take on the cost of the new APEGA requirements through fees because they are the ones who benefit from APEGA ensuring the competency of hired engineers.

#### Background:

In 2008 Mr. Ladislav Mihaly filed his complaint against APEGA to the Alberta Human Rights Commission, claiming that he had been refused registration as a result of discrimination against his place of origin. The following background is a summary of the Human Rights Commission Decision (2014), the Court of Queen's Bench Decision (2016), and the Alberta Court of Appeals Decision (2017). Mr. Mihaly first applied for registration as a professional engineer with APEGA in 1999. He was instructed to write several exams including the National Professional Practice

Exam (NPPE) and three confirmatory examinations. After failing the NPPE, reapplying to write it and then not attending his second attempt, Mr. Mihaly's application was withdrawn by APEGA. Mr. Mihaly then reactivated his application in 2002, was given the same exams to write, reattempted and failed the NPPE and didn't write any of the confirmatory exams. APEGA then withdrew the application because exams were not completed within the required time frame. Finally, Mr. Mihaly reactivated his application for the third time. He was informed he had to write three confirmatory exams as well as a course in Engineering Economics or write the Fundamentals of Engineering Examination. None of these exams were written and shortly after Mr. Mihaly filed his complaint.

The first group involved in this complaint was the Alberta Human Rights Commission. To establish discrimination The Human Rights Commission had to establish that Mr. Mihaly was subject to an adverse impact due to the decisions made by APEGA and that his place of origin was at least part of the reasoning behind said decisions. The Human Rights Commission first established that Mr. Mihaly's place of origin could be understood as his place of education because he was born in the same country that he was educated in. The Commission then established that Mr. Mihaly had indeed suffered undue hardship because of the decisions made by APEGA from difficulty finding engineering jobs to the hardship of having to go out of one's way to pay for and write the required examinations where such restrictions were not applied to Canadian graduates. Using these to establish discrimination it was left to APEGA to justify their requirements. APEGA's justification was about adopting a fair standard that fulfilled only the requirements for a baseline of engineering knowledge to ensure the safety of the public. The Human Rights Commission accepted APEGA's arguments and agreed that the testing was valid for establishing a baseline of engineering knowledge however the Commission found that APEGA had done an unsatisfactory job to help educate and get foreign graduates involved. Citing both the foreign degrees lists reliance on public information obtained without any effort by APEGA to contact their facilities, as well as the lack of catchup or individualized help courses to help foreign trained engineers get a better understanding of Canadian Law and professional engineering ethics offered to Mr. Mihaly after his failure to complete the NPPE. The Commission then ordered APEGA to take a more personalized approach to Mr. Mihaly's situation, matching him with mentors and establishing a committee to assess the qualifications of Mr. Mihaly and explore options to provide gradual assistance in the development of Mr. Mihaly's career.

APEGA then goes to appeal the Commission's decision regarding the discrimination at the Court of Queen's Bench. APEGA argues primarily against discrimination and for their justification. In their argument against discrimination the Court of Queen's Bench sides with them stating that although Mr. Mihaly was adversely impacted by the NPPE and the reason he had to take it was his country of origin, there was no connection between his country of origin and his inability to pass the NPPE, meaning that the accusation that APEGA's requirements perpetuate disadvantage to those coming from another country is unfounded. In relation to the justification of APEGA's practices the court also sided with APEGA finding that the evidence

cited in the Human Rights Commissions decision was not relevant and therefore the verdict unreasonable. This led to the full reversal of the Human Rights Commissions decision.

Finally, the issue was brought up, one last time in 2017 in the Court of Appeal by Mr. Mihaly where it was dismissed because Mr. Mihaly did not bring sufficient evidence to any error made by the Court of Queen's Bench. Mr. Mihaly attempted to bring attention to a dating inconsistency on the Foreign degree list used in the hearing, which was 2010 compared to the 2000 to 2006 in which he was trying to apply to become a professional engineer, and an agreement between Canada and the European Union with regards to Cooperation in Higher Education. The Court of Appeal countered saying that the inconsistent year made no difference in the hearing as the document was in Mr. Mihaly's favor and there is no evidence that his education would have been treated differently between the years of 2000 and 2010 and that Mr. Mihaly had shown no evidence that the agreement required APEGA to treat his education as equivalent to one in Canada.

### Court of Queen's Bench Decision:

In the Court of Queen's Bench Decision (2016) APEGA approached the Court of Queen's Bench with 4 main issues regarding the decision of the Human Rights Commission:

1. Procedural fairness
2. Jurisdiction
3. Prima face discrimination
4. Justification

When considering procedural fairness, the Court of Queen's Bench was looking for evidence that the tribunal made its decision in the absence of representation by APEGA. If this had been the case APEGA would not have had the chance to defend themselves and therefore rules of procedural fairness would have been broken. In this section APEGA points to a section 8 of the Engineering and Geoscience Profession Regulation (EGPR) which was used by the tribunal in their final decision but was not brought up by any parties during the hearing. In this case however, the Court ruled that as procedural fairness only applied to "new ground". "New ground" being if the decision was based off an entirely different reason than those brought up during the hearing. As such the Court ruled in favor of the Tribunal believing that although the law was not addressed, the reasoning behind the decision was consistent and that the reference to said law was merely part of the reasoning and not the deciding factor.

In the case of jurisdiction APEGA argues that the Human Rights Commission did not have the grounds to take the complaint as they did, saying that this was an issue about discrimination based on origin of education which is not protected under the Alberta Human Rights Act rather than the place of origin which is. APEGA uses a case of *Grover v Alberta Human Rights Commission* as evidence where Dr. Grover tried and failed to get the Court of Queen's Bench to overturn the decision to decline her case made by the Alberta Human Rights Commission. The

Court of Queen's Bench then went on to argue that in the case of Grover there was no clear connection between Dr. Grover and her place of origin as she was born in Holland and got her degree at the University of Toronto, however in this case there is a clear link as Mr. Mihaly was born in the same place he got his degree from and as such the Court ruled that APEGA had not established a lack of jurisdiction for the Tribunal.

As for prima face discrimination the Court was looking to confirm the Tribunals findings that Mr. Mihaly was in fact being discriminated against. APEGA argued that Mr. Mihaly was never discriminated against, and that his place of origin was not a factor in the matter unlike what the Human Rights Commission had found. To start the Court investigated the Tribunals findings, that APEGA's process for testing graduates from some countries differed from others, because the Foreign Degree list and Mutual Recognition Agreements were based off discriminatory assumptions. The Court found that the construction of these lists allowing for the recognition of foreign degrees was not discriminatory but in fact demonstrated that APEGA was doing its due diligence and not making any assumptions until the institution under scrutiny had satisfied them. The Court then went on to tackle the idea that Mr. Mihaly's place of origin was in fact linked to any of the adverse impacts experienced. On this point the Court decided, similarly to the case for jurisdiction, that because Mr. Mihaly was born raised and educated in the same place and showed no inclination to travel for an education he had no way to avoid the exams, and therefore his place of origin did play a part in his experience. However, although Mr. Mihaly's place of origin was relevant the Court still had to look at the claims that the exams caused an adverse impact. In this area the Court noted that Mr. Mihaly had to take the Fundamentals of Engineering Exam or three confirmatory exams, the NPPE, and have at least one year of Canadian experience. The Court also noted that the Fundamentals of Engineering Exam and the confirmatory exams are unique to foreign degrees, while the NPPE and year of experience are required by all engineers and, as no consideration was given by the Tribunal as to whether these requirements themselves are discriminatory, they were not relevant in this case. This leaves only the hardship experienced by Mr. Mihaly as a result of the Fundamentals of Engineering or the confirmatory exam.

Finally, APEGA argues their justifications for requiring the Fundamentals of Engineering and confirmatory exams for new foreign trained engineers. The Tribunals main arguments as to why they think APEGA's methods were discriminatory were that APEGA had not made any effort to consider more individualized testing and that general measures such as standardized testing were not accurate measurements of how well an engineer could perform their job. The Court ends up dismissing these arguments saying that APEGA already individually assess their applicants to determine the exams that they must write as well as assess institutions largely with the help of organizations such as CEAB stating that there was no evidence that these assessments are unfair with most applicants passing, as well as no evidence showing that APEGA could do more reasonably. With this in mind, the argument against standardized testing was irrelevant as well because completely individualized testing would be beyond APEGA's means. The Court also considers the applications of standardized testing and finds them useful

when determining a baseline knowledge which fits with APEGA's goal. When taking into consideration the cost of the solutions laid out by the Tribunal as well as the justification for standardized testing in this case, the court found that the APEGA meet the requirements for a "reasonable and justifiable" defense of their methods.

## Reflection and Opinion:

The Human Rights Commission I think is on the right track when trying to give foreign trained engineers the ability to work here because expecting an educated person who has worked hard and dedicated their life to engineering practice in a different country to completely change their way of life when coming to Canada would be not be reasonable. However, the changes ordered by the human rights council were also too heavy handed, trying to make many resources and mentorships available to a single person in a system that was already accepting most engineers who applied. Overall, I agree most with the decisions made at the Court of Queen's Bench to remove the orders by the Human Rights Commission and the Court of Appeal to dismiss the case. However, I feel like we should pay close attention to Mr. Mihaly's situation and consider the Human Rights Commission's recommendation to look carefully into providing ample resources for foreign engineers, so they can continue to work in the career path that they have chosen in Canada. As Linda McKay writes when discussing the matter "Providing waivers in some circumstances for the requirement to meet competency exams like the FEE does strike a balance between the need to ensure competency for individuals from a wide range of backgrounds and the need for individual assessment." (McKay-Panos, 2016) and APEGA needs to find that balance.

One thing I think that APEGA could do better which is in line with the Human Rights Commission's recommendation is to guide people to proper resources and opportunities based on their area of practice and testing results. It is not unreasonable to assume as laid out in the Human Rights Commission's decision that foreign workers might not know about standard procedures in Canadian engineering and as such might have a difficult time on the NPPE or Fundamentals of Engineering exam. Having APEGA offer guided seminars or recommend certain programs would help in this area. Doing research into APEGA's own and recommended resources shows that they have developed an extensive list of applicable resources, so recommending relevant ones to new immigrants looking to get registered, as well as guiding them through a very busy time of their lives, could be incredibly beneficial to all parties.

Another point that APEGA might consider is the language of foreign engineers. We cannot always assume the language background of incoming foreign trained engineers and as Jason Wai puts it "If APEGA's focus is on its engineers having a strong command of English, then an English exam such as the Test of English as a Foreign Language (TOEFL) before taking any such further exams." (Wai, 2014). Either that or if engineers are not expected to have a strong command of the English language "certain steps may need to be taken to ensure that foreign

engineers are not discriminated against simply on the basis of English being their second language.” (Wai, 2014).



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