

**Mihaly Case Study**  
**ENGG 513 – Winter 2018**  
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## **Introduction**

The case study of Mr. Ladislav Mihaly versus APEGA serves as an exploration into the roles and responsibilities of a professional occupational regulatory body and legal issues that can arise in the course of its operation. We learn of the extensive requirements to become registered as a Professional Engineer in Alberta, and the additional challenges that people with foreign educations may face. This case follows the process of Mr. Mihaly's struggle to become registered with APEGA which leads to his complaint to the Alberta Human Rights Commission of discrimination by APEGA.

The Alberta Human Rights Commission decides in Mr. Mihaly's favour, but APEGA appeals to the Alberta Court of Queen's Bench who then reverses this decision. There is an elementary examination into the applications of the Alberta Human Rights Act in a case of discrimination and to the decision-making procedures of a human rights tribunal.

Mr. Mihaly applies an appeal to the Alberta Court of Appeal to revert to the initial decision, but his appeal is dismissed. An insight to the appeal process of court decisions is developed as the case moves through the Alberta Court of Queen's Bench and finally the Alberta Court of Appeal.

## **Stakeholders**

### APEGA

The Association of Professional Engineers and Geoscientists of Alberta is a regulatory body for professional engineers and geoscientists practising in Alberta. One of their main roles is to give licenses to engineers and companies who meet APEGA's standards to practise in Alberta. The requirement for APEGA's regulation standards are stipulated in *Engineering and Geoscience Professions General Regulations* (EGPR) [Mihaly v APEGA. 2014. para. 43]. These standards are to protect the interests and safety of the public by ensuring that engineers working in Alberta are competent, professional, and ethical in their work ["About APEGA," n.d.].

### The Court of Queen's Bench

The Court of Queen's Bench of Alberta is a superior court with jurisdiction over criminal and civil trials and appeals from other provincial courts. The Court consists of the Chief Justice, Associate Chief Justice, and a number of other federally appointed justices ["Court of Queen's Bench of Alberta," N.d.].

### The Alberta Human Rights Commission (AHRC)

The Alberta Human Rights Commission was created by the Alberta Government to uphold the Alberta Human Rights Act, which seeks to protect people from

discrimination. Their mandate is “to foster equality and reduce discrimination” [“About the Commission,” 2012] One of their duties is to hold public tribunal hearings on human rights complaints.

#### Mr. Ladislav Mihaly

Ladislav Mihaly was born and received his education in Czechoslovakia. He has a Masters degree in Technology of Fuels and Thermal Energy at the Slovak University of Technology in Bratislava. He received a Certificate in Corrosion Engineering from the Institute of Chemical Technology in Prague. Mr. Mihaly first applied to APEGA to be registered as a Professional Engineer in May 1999. He claims to have 12 years of international engineering experience.

#### The Alberta Public

The Alberta public has an interest in the standard of engineers working in the province. People rely on APEGA’s standards and requirements to ensure that registered Professional Engineers meet a certain level of experience, competency, and professionalism. This is important for the public’s peace of mind to know that Alberta engineers can be trusted to perform their work in a manner that protect public safety.

#### International Engineering Graduates

Graduates from foreign engineering programs that want to immigrate and work in Alberta as Professional Engineers will be subject to APEGA’s registration requirements. Whether those requirements change or not depends on the decisions made by the tribunal and courts in this case.

## **Background**

### **Mr. Mihaly**

Mr. Mihaly applied to APEGA for registration as a Professional Engineer in May 1999. After the review his transcripts, experience and references by the APEGA Board of Examiners they informed Mr. Mihaly that he needed to complete three confirmatory exams, a course or exam in engineering economics, and the National Professional Practice Exam (NPPE). Mr. Mihaly failed his first attempt at the NPPE on January 15<sup>th</sup>, 2000. He then applied to re-write the NPPE but did not attend on the day of the exam and APEGA withdrew his application in June 2001 because he had not completed any of the confirmatory exams. In May 2002 Mr. Mihaly requested that APEGA reactivate his application for registration but he fails his second attempt at the NPPE and his application is again withdrawn in August 2003.

During this period Mr. Mihaly complained twice to APEGA regarding their refusal to accept his academic qualifications as equivalent to a Canadian engineering education. APEGA informs Mr. Mihaly that there is no Mutual Recognition Agreements (MRA) in place between Canada and the ex Czechoslovakia, but his program is on the Foreign Degree List. In October 2006 Mr. Mihaly asked APEGA to reactive his application, and again APEGA told him he had to write the three confirmatory exams and the engineering economics exam, or the Fundamentals of Engineering (FE) exam. He failed the third attempt at the NPPE and did not complete any of the confirmatory exams. APEGA also informed him that he had not yet acquired the necessary one-year of North American Professional engineering.

### **Alberta Human Rights Commission**

On August 5<sup>th</sup>, 2008 Mr. Mihaly filed a complaint against APEGA with the Alberta Human Rights Commission. Mr. Mihaly claimed that APEGA discriminated against him based on his place of origin, which is one of the grounds protected by the Alberta Human Rights Act (AHRA). The Alberta Human Rights Commission held a tribunal hearing on February 6, 2014.

The Tribunal used the *Moore* test [*Moore v. British Columbia (Ministry of Education)*, 2012. Para. 33] to show that Mr. Mihaly had successfully demonstrated *prima facie* discrimination. He had to show that he has a characteristic that is protected from discrimination under the AHRA; that he experienced an adverse impact; and the protected characteristic plays a factor in causing the adverse impact. The protected characteristic was Mr. Mihaly's "place of origin" [*Alberta Human Rights Act*], which they found to be broad enough to include place of education. The adverse impact was the registration process that assessed his qualifications and required having to write the confirmatory or FE exams. The place of origin of Mr. Mihaly's education was a factor in the adverse impact.

The Tribunal assessed APEGA's standards to determine if they were justified, but the Tribunal concluded that APEGA's requirements were

discriminatory that they did not reasonably accommodate Mr. Mihaly. APEGA was ordered to make several modifications their assessment procedure and examination requirements to be more individualized, and to provide Mr. Mihaly with addition support to integrate into the Alberta Engineering workforce. Mr. Mihaly was also awarded \$10,000.00, but the Tribunal denied his request for compensation due to lost wages while he was not working as an engineer.

### **The Court of Queen's Bench**

APEGA filed an appeal to the Court of Queen's Bench seeking a reversal of the Alberta Human Rights Tribunal's decision. Mr. Mihaly filed a cross appeal for the Tribunal's refusal to grant him damages for lost wages. APEGA called into question the procedural fairness of the Tribunal's process, and whether it acted within its jurisdiction to decide that protection of "place of origin" [*Alberta Human Rights Act*], was broad enough to include the origin of educational credentials. The Court disagrees with APEGA, saying that the Tribunal had the jurisdiction and that it did not violate procedural fairness rules.

APEGA also claims that the Tribunal's usage of the Moore test for *prima facie* discrimination was not sufficient. The Court agreed with the Tribunal's usage of the *Moore* test, but they disagreed with the Tribunal's finding that place of origin was a factor in the adverse impact that Mr. Mihaly experienced. The Court disagreed with the Tribunal's assessment that APEGA did not provide reasonable accommodation for Mr. Mihaly, stating that the accommodations that the Tribunal ordered of APEGA would cause undue hardship.

The Tribunal's interpretation of the EGPR was also determined to be unreasonable by the Court. The Court of Queen's Bench concluded that the Tribunal's decision should be reversed [*APEGA v Mihaly*. 2016. para. 4].

### **The Alberta Court of Appeal**

On February 22, 2016 Mr. Mihaly filed an appeal regarding the Court of Queen's Bench's decision to reverse the initial decision made by the Alberta Human Rights Tribunal. The appeal was struck on June 23, 2016 because Mr. Mihaly had not filed the Appeal Record, but he applied to have it restored again on December 15, 2016 and the hearing was eventually held on January 10, 2017. The Alberta Court of Appeal considered the following factors [*Mihaly v APEGA*. 2017. para. 4] in the appeal:

- a) arguable merit to the appeal;
- b) an explanation for the defect or delay which caused the appeal to be taken off the list;
- c) reasonable promptness in moving to cure the defect and have the appeal restored to the list;
- d) intention in time to proceed with the appeal;
- e) lack of prejudice to the respondents (including length of the delay).

Mr. Mihaly argues that there is merit to his appeal because he attempted to get the Court of Queen's bench to reconsider their decision, but they refused. The Court of Appeal dismissed this because decisions made by the Court of Queen's Bench are

generally considered as final. They also determined that Mr. Mihaly failed factors b, c, and d because he could not explain why his appeal was delayed, he did nothing to improve his appeal since it was filed, and he still had not filed the Appeal Record, respectively. Finally, with respect factor e, the Alberta Court of Appeal said the APEGA is entitled to closure in this case and so the appeal was dismissed.

### **The Court of Queen's Bench**

APEGA filed an appeal to the Court of Queen's Bench on November 20, 2014 against the judgement of the AHRC. Mr. Mihaly filed a cross appeal regarding the AHRC's decision not to award compensation for lost wages and requested either \$1,000,000.00 and APEGA registration as a Professional Engineer or \$2,000,000.00 without registration. The main issues that were evaluated in the appeal are the procedural fairness, the jurisdiction of the Tribunal, the determination of *prima facie* discrimination, and justification of APEGA's defense.

#### **Procedural Fairness**

The Tribunal concluded that APEGA's examination requirements are not justified because they do not follow a curative approach to an applicant's academic deficiency. This was based on section 8 of the EGPR which states that an examination candidate (such as Mr. Mihaly) is required to "complete one or more confirmatory examinations or examinations for the purpose of correcting a perceived academic deficiency" [*Mihaly v APEGA, 2014*. para. 43]. APEGA argues that the Tribunal did not consider the "or", which means that the exams could be for the purpose of confirming educational qualifications without having to be curative. APEGA claims that the Tribunal was not following procedural fairness because they were not given the chance to respond to the Tribunal's interpretation. The Court finds that there was no violation of procedural fairness since it is not required that the Tribunal give parties the chance to address every part of the law when making its decision. However, the Court determined that the Tribunal's interpretation of section 8 of the EGPR was flawed.

#### **Jurisdiction**

APEGA argues that the Tribunal does not have the jurisdiction to determine that an individual's place of education falls within the "place of origin" protection under the AHRA. The Court agreed with the Tribunal that a person's place of education is often "inextricable linked to his place of origin" [*Mihaly v APEGA, 2014*. para. 173]. Thus, the Tribunal did have the jurisdiction and their application of the Moore test to determine *prima facie* discrimination was appropriate.

#### **Prima facie Discrimination**

APEGA submits that the Moore test for establishing *prima facie* discrimination is not sufficient, and that differential treatment of applicants in relation to the confirmatory exams APEGA requires is discriminatory only if it can be shown that it is based on arbitrary standards and stereotyping. While the Court

did agree that stereotyping is relevant, it does not need to be shown for the *prima facie* stage.

The Tribunal determined that APEGA was discriminating by assuming the inferiority of foreign engineering programs that are not part of a Mutual Recognition Agreement. The Court decided that this was unreasonable because the Tribunal's findings were not substantiated by the evidence supplied by APEGA regarding the assessment of foreign engineering programs. APEGA uses knowledge of the programs to distinguish between the academic qualifications of a Canadian graduate and a graduate of a foreign program, and when there is not enough information to assess a program it does not make any assumptions to the qualifications of a graduate.

The Tribunal used the requirement to write the FE exam as an adverse impact, but then also included the NPPE and one year of Canadian engineering experience in the case for *prima facie* discrimination. The Court found that the Tribunal was unreasonable in their application of the *Moore* test with respect to the NPPE and experience requirement because there was no evidence to support this. Mr. Mihaly's place of origin would not make it more difficult to pass these exams, and his difficulty finding a job and getting experience was also not related to his place of origin.

### Justification

The Court also looked at APEGA's defense to see if they were reasonably justified with their requirements. In the legal test of justification as set out in *Meiorin and Grismer* [*Mihaly v APEGA, 2014. para. 184*]. APEGA had to prove that:

- 1) the requirements are for a purpose that is rationally connected to their function
- 2) it adopted the requirements in good faith, in the belief that it is necessary for its function
- 3) it cannot accommodate the claimant without undue hardship

The Tribunal only had an issue with the third point, finding that APEGA did not reasonably accommodate Mr. Mihaly. The Tribunal ordered APEGA to establish a committee to perform more individualized assessment of applicants instead of relying on a standardized "one size fits all" [*Mihaly v APEGA, 2014. para. 211*]. approach of the FE exam and NPPE. The Court disagrees with the Tribunal regarding what constitutes reasonable accommodation, as these orders would cause undue hardship to APEGA by requiring a significant amount of resources and fundamentally altering the way APEGA functions as a regulatory body. The final decision is that the Tribunal's decision should be reversed, and Mr. Mihaly's cross appeal for compensation due to lost wages is dismissed.

## **Reflection and Opinions**

I agree with the decision made by the Court of Queen's Bench to reverse the Alberta Human Rights Commission's decision. I believe that if the Alberta Human Rights Commission's ruling was not over turned and its orders to APEGA were followed it would set a dangerous precedent that could potentially allow underqualified engineers to practice in Alberta. I also agree with the decision of the Alberta Court of Appeal to dismiss Mr. Mihaly's appeal because it was obvious that he did not put much effort into appeal beyond just submitting it. Mr. Mihaly appeal that he receive millions of dollars in damages from APEGA for missed wages is ridiculous, since it was not APEGA's fault that there were no engineering firms willing to hire him.

It is APEGA's responsibility to have requirement standards of a high enough level to ensure that engineers who are practicing under the title of a Professional Engineer have a competent knowledge in the basis of engineering, professionalism, and ethical behavior.

Both of my parents immigrated to Canada as professionals and so based on second hand knowledge I can sympathize with Mr. Mihaly's struggle to reestablish himself as a Canadian immigrant and to get his foreign academic qualifications recognized. In my opinion Mr. Mihaly could have done a lot more to help himself as he tried to become registered with APEGA, but we know he did not even try to complete any of the confirmatory exams or the FE exam.

I think APEGA could do more to point foreign-trained engineers towards support resources, but I don't believe APEGA should accommodate them in the ways that the Alberta Human Rights Tribunal suggested. I agree with the Court of Queen's Bench that the Tribunal's orders would have fundamentally changed the function of APEGA and this is an unreasonable accommodation.



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