

**ENGG 513**

**Assignment 1: Mihaly Case Study**

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## Introduction

The following report is an in depth analysis and overview of the discrimination case; The Association of Professional Engineers and Geoscientists of Alberta vs. Mr. Ladislav Mihaly. This case was brought to the Alberta Human Rights Committee Tribunal in 2014 and then later appealed at the Court of Queen's Bench in 2016.

Mr. Mihaly was an immigrant to Canada from Czechoslovakia who applied to become a Professional Engineer through the Association of Professional Engineers and Geoscientists of Alberta (APEGA ) in 1999 after his arrival. However, because Mr. Mihaly received all his certification from a foreign country whose education programs were not recognised to be on par with the Canadian program, many additional examinations were requested of Mr. Mihaly. This led to withdrawal of applications, failure to pass multiple examinations, and a constant back and forth dispute between Mr. Mihaly and APEGA. Ultimately, a complaint was filed and settled upon by the Tribunal in 2014. However, the decision was brought to the Court of Queen's Bench and appealed by APEGA in 2016 and overturned. This report will evaluate all the major stakeholders involved in the case, followed by a brief summary of the case, along with an in-depth analysis of the Court of Queen's Bench decision to overturn the Tribunal's decision.

## Stakeholders

### *APEGA*

APEGA is short for the Association of Professional Engineers and Geoscientists of Alberta, and formerly APEGGA as it is referred to in much of the case study documents. It is the main regulating body that acts on behalf of the Government of Alberta for ensuring legitimate practices of engineering and geoscience in the province. Their main duty is licensing qualified individuals and companies with the certifications that are necessary in order to practice their profession. Along with providing licenses, APEGA is also responsible for setting appropriate practice standards in the province as well as developing a code of conducts and ethics that will govern all its members and permit holders. At the same time, it must also ensure a safe working environment, safety of the public, and the well-being of the organization and its members. This gives APEGA the right to conduct any research on its members, permit holders, and affiliated organizations, it gives them the freedom to investigate and rightfully discipline any body that practices without a license or is proven to have breached the APEGA agreements and code of conduct. APEGA's main purpose is highlighted in their mission statement, which is to, "regulate the practices of engineering and geoscience to serve the public interest in Alberta."<sup>1</sup>

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<sup>1</sup> "About APEGA | APEGA." <https://www.apega.ca/about-apega/>. Accessed 16 Feb. 2018.

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

The Court of Queen's Bench is the higher court system (compared to the Provincial Court) in Alberta. It is made whole by the Court of Queen's Bench Act<sup>2</sup> and the Federal Government is given the responsibilities of appointing justices to the Court of Queen's Bench. This is the superior trial court for the province of Alberta and it holds trials of both criminal offence and civil matters. However, since this is the highest court system, it will often hear trials of very serious criminal and civil offences and appeals. One big difference between this and the Provincial Court is that it very often allows for civil jury trials.

### *The Alberta Human Rights Commissions*

The Alberta Human Rights commission is an independent commission created by the Government of Alberta in order to fulfill the promises of the Alberta Human Rights Act. Specifically, the Minister of Justice and Solicitor General is handed the responsibility of maintaining and watching over the commission. The commission was created in order to protect Albertan's from, and also reduce discrimination, and also to provide all in the province with an equal opportunity to succeed and make a living in Alberta. In other words, it's two mandates are to foster equality and to reduce discrimination. These are the main functions that form the basis of the Alberta Human Rights act which is the reason why the Alberta Human Rights Commission was established.<sup>3</sup> The Order in Council is responsible for appointing the body of the commission which consists of the Chief of the Commission and Tribunals and all the members of the commission. The chief, head of the commission, must keep the Minister of Justice and Solicitor General up to date with all human rights issues, along with many other responsibilities, their main purpose is to ensure the commission has set appropriate goals and are heading in the right direction. The Tribunal is a list of appointed members by the chief to hold public hearings that examines human rights complaints.

### *Mr. Ladislav Mihaly*

Mr. Ladislav Mihaly is the complainant in the case of Mihaly vs. APEGA. Mr. Mihaly is complaining that APEGA has discriminated against him and his application to become a professional engineer in Alberta. Mr. Mihaly was born in Czechoslovakia and had obtained two educational certifications; a M.Sc. Diploma with specialization in Technology of Fuels and Thermal Energy from Slovak Technical University in Bratislava in 1975, followed by a certificate in corrosion engineering from Institute of Chemical Technology in Prague in 1981. Before immigrating to Canada in 1999, Mr. Mihaly worked from numerous years in his home country. After coming to Alberta, he applied to become a professional engineer via APEGA.

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<sup>2</sup> "Welcome by the Honourable Chief Justice Mary Moreau - Alberta Courts." <https://albertacourts.ca/qb/about/welcome>. Accessed 16 Feb. 2018.

<sup>3</sup> "Alberta Human Rights Commission." <https://www.albertahumanrights.ab.ca/>. Accessed 16 Feb. 2018.

*Dean David Lynch*

Dr. David Lynch is an accomplished professional in the engineering industry. Originally starting as an assistant professor at the University of Alberta, Dr. Lynch has moved up all the way to becoming the Dean of Engineering at the University of Alberta for over the past 19 years. As a specialist in evaluation of engineers educated outside of Canada, Dr. David Lynch appeared in court as a witness on behalf of APEGA testifying about the international agreements and engineer evaluations according to the policies of APEGA. Dr. Lynch's expertise in this area stems from his experience of 11 years and counting as a member of the Canadian Engineering Accreditation Board (CEAB). A core responsibility of this role is assessing engineering programs from outside Canada to determine if they are equivalent to the standards set by the Canadian system.

*Dr. Gary Faulkner*

Dr. Gary Faulkner currently holds the role of Director of Rehabilitation in the Research and Technology Development department at Glenrose Rehabilitation Hospital. However, his engineering background stems all the way back to 1969 where Dr. Faulkner graduated with his Ph.D in Applied Mechanics from the University of California. Shortly after, Dr. Faulkner eventually took the role of Chair of the Mechanical Engineering department at the University of Alberta. Dr. Faulkner's experience that allows him to be reliable witness for the respondents, APEGA, is his role on APEGA's Board of Examiners which he joined in 1988. Seven years after joining, he became Chair of the Board of Examiners and holds that position to this date.

*Mr. Mark Tokarik*

During the initial stages of the conflict between Mr. Mihaly and APEGA, Mr. Tokarik was the main person communicating with Mr. Mihaly on APEGA's behalf. At the time, Mr. Tokarik held the position of Director of Registration. He originally joined APEGA in 1999. Mr. Tokarik has an impressive resume which consists of a Bachelor of Science in Engineering degree that he graduated with in 1981 along with a Bachelor of Law degree which he obtained in 1989. Mr. Tokarik has also been heavily involved with a couple committees regarding foreign engineering qualification and admissions. These include the Engineers Canada's Foreign Engineering Qualification Committee (FEQC) and the Canadian Engineering Qualification Board (CEQB).

## Background

Mr. Ladislav Mihaly is an individual from Czechoslovakia who holds two Masters degrees, one from Slovak University of Technology in Bratislava and the other from the Institute of Chemical Technology in Prague. Upon arrival in Canada, Mr. Mihaly applied to be certified as a Professional Engineer through the APEGGA organization in May of 1999.

However, due to Mr. Mihaly's educational institutions being listed on the Foreign Degree List, it was required that Mr. Mihaly successfully complete three additional confirmatory examinations and an extra Engineering Economics exam along with the standard National Professional Practice Exam (NPPE). APEGA required all examinations to be successfully completed by May 2001.

Mr. Mihaly began completing his examinations in 2000, but he failed his attempt at the NPPE. Around half a year later, he failed to be present at his second of the NPPE exam. Due to Mr. Mihaly's failure to complete the required examinations, APEGA informed him that his application to become a Professional Engineer has been withdrawn in mid-2001. The next few years consisted of an ongoing dispute between Mr. Mihaly and head members of the APEGA organization, mainly Mr. Tokarik (Director of Registration at the time), regarding the validity of Mr. Mihaly's education and experience. Mr. Mihaly was able to get APEGA to reactivate his application but upon another another failure of the NPPE along with neglect of the additional examinations, his application was again withdrawn by APEGA. This sequence of action occurred a third time before his application was again withdrawn. Then in 2008, Mr. Mihaly officially filed a complaint on the basis of discrimination by APEGA in denying his registration to be a professional engineer to the Alberta Human Rights Commission. The complaint was backed by the accusation that APEGA has violated the Alberta Human Rights Act, RSA 2000, c A-25.5. Years later in February of 2014, the Tribunal concluded that Mr. Mihaly was indeed discriminated upon by APEGA in his pursuit of obtaining a Professional Engineer certification. The Tribunal resulted in compensating Mr. Mihaly \$10,000 for general damages and ordered APEGA to reconsider Mr. Mihaly's application along with providing Mr. Mihaly with aid to assist him in passing the NPPE.<sup>4</sup>

Later that year in 2014, the Tribunal's decision regarding Mr. Mihaly's complaint was filed for an appeal by APEGA. The appeal was submitted based on these four arguments; procedural fairness, jurisdiction, prima facie discrimination, and justification. The four arguments or pillars were brought to the Court of Queen's Bench in which many precedents were reviewed, compared, and used to help analyze the current case. After deliberation, the Queen's Bench concluded by rejecting the first two pillars presented, having a split decision on the third,

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<sup>4</sup>*Association of Professional Engineers and Geoscientists of Alberta v Mihaly*, 2016 ABQB 18, 4

and reversing the Tribunal's decision on the fourth. Ultimately, the Queen's Bench decided to rule in favour of APEGA and grant the appeal by reversing the decision originally made by the Tribunal. Finally in June 2016, the Alberta Court of Appeal closed a final appeal by Mr. Mihaly after he failed to follow up on his questions regarding his appeal.

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

APEGA's appeal against the decision of the Alberta Human Rights Tribunal was filed on November 20, 2014. The official appeal hearing proceeded on July 23 and 24, 2015, and was built upon four key pillars. These pillars represented issues with the tribunals procedural fairness, jurisdiction, *Prima facie* discrimination, as well as justification.

Regarding the tribunals procedural fairness, APEGA challenged the Tribunals claim that examinations required by APEGA were not "for the purpose of correcting a perceived academic deficiency"<sup>5</sup>. This criteria was defined in section 8(b)(ii) of the Engineering and Geoscience Professions General Regulation (EGPR). In this definition, it states that an applicant may be assigned "confirmatory examinations or examinations for the purpose of correcting a perceived academic deficiency"<sup>6</sup>. APEGA argued that the Tribunal neglected the "or" phrase in this statement and also claimed that the Tribunal breached its duty of fairness by basing its decision on these grounds, which the parties did not bring up and were not given an opportunity to address.

The Queen's Bench decided that although the Tribunal could have questioned the interpretation of the EGPR, the material was not particularly relevant to the overall decision, and the case was not one where APEGA did not have a chance to respond to evidence and submissions made.

The next argument brought on by APEGA claimed that the Tribunal did not possess legal jurisdiction over Mr. Mihaly's complaint as the Alberta Human Rights Act (AHRA) does not offer protection against discrimination based on "place of origin of academic qualifications"<sup>7</sup>. This pillar raised many technicality based arguments, citing previous cases, based on the definition of "place of origin" and how it relates to an individual's identity and perceived quality of education. *Grover v Alberta Human Rights Commission*, 1999<sup>8</sup>, has previously set a precedent for APEGA's argument, creating a clear distinction between "place of origin" and the place of education.

However, the Queen's Bench brought up that in the *Grover* case, the complainant was born in Holland but had moved to Canada at the age of two. This case was very different than Mr. Mihaly's case, where he grew up, and was educated in Slovakia. Due the disconnect between the two cases, this pillar was also rejected.

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<sup>5</sup>*Association of Professional Engineers and Geoscientists of Alberta v Mihaly*, 2016 ABQB 61, 9.

<sup>6</sup>*Association of Professional Engineers and Geoscientists of Alberta v Mihaly*, 2016 ABQB 61, 9.

<sup>7</sup>*Association of Professional Engineers and Geoscientists of Alberta v Mihaly*, 2016 ABQB 61, 10.

<sup>8</sup>*Grover v Alberta Human Rights Commission*, 1999 ABCA 240 (CanLII)

APEGA also disagreed with the basis for *Prima facie* discrimination. The Tribunal was challenged on whether it used and reasonably applied the correct legal test in determining whether Mr. Mihaly had in fact demonstrated *prima facie* discrimination. The pillar brought about the argument of the “Moore test”<sup>9</sup>, a test commonly used in Alberta provincial law to define a basis for discrimination. In the “Moore test”, it is essential to show that an individual has a characteristic that is protected from discrimination and that they have experienced an adverse impact. There also must be a very well defined connection showing that the protected characteristic was a factor in the adverse impact. APEGA believed that Mr. Mihaly could not establish an adverse impact as he never wrote the confirmatory or FE examinations, and so it was unknown if he would have failed the exams.

Regarding this pillar, the Queens Bench held a split opinion. It agreed that because Mr. Mihaly had no option other than to write confirmatory or FE exams, as he had already pursued his education in Slovakia, he was restricted and his place of origin was indeed a factor in the adverse impact. However, it was also noted that no basis for a finding was established linking the National Professional Practice Exam (NPPE) and the requirement of relevant work experience, two important obstacles for Mr. Mihaly. Both of these items were requirements for all applicants with APEGA, regardless of country of origin, and so it could not be argued that they constituted adverse impact discrimination. Due to the Tribunal's inability to fully apply the “Moore test” to the NPPE and experience requirements, the Queen's Bench decided that the finding of *prima facie* discrimination in relation to the mentioned items to be unreasonable.

Lastly, APEGA argued that the Tribunal's decision regarding APEGA's registration requirements for foreign engineers being unreasonable was unjustified. The Tribunal decided that APEGA did not reasonably accommodate Mr. Mihaly's skillset and should not have applied a “one size fits all”<sup>10</sup> mentality to their evaluation. Additionally, the Tribunal used the case of *Meiorin, supra*,<sup>11</sup> where a female firefighter was laid off because she could not pass a new fitness test, as an example of the flaws in APEGA's candidate evaluation, stating “foreign engineering graduates similarly, are expected by [APEGA] to run 2.5km in 11 minutes like all Canadian engineering graduates”<sup>12</sup>.

The Queen's Bench, however, spoke to the several thousand engineering programs recognized by APEGA, as well as the evidence that accreditation was a complex, costly procedure. These points proved a significant dedication of resources was needed to create special entrance programs on a per person basis, and that it would be unreasonable to place this burden on APEGA. Additionally, the Queen's Bench denounced the *Meiorin* example as a poor comparison with little in common. *Meiorin* was special in that the high aerobic standard was not shown to be reasonably necessary to the safe and efficient performance of a firefighter, and the

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<sup>9</sup>*Moore v. BC (Education)*, 2012 SCC 61.

<sup>10</sup>*Association of Professional Engineers and Geoscientists of Alberta v Mihaly*, 2016 ABQB 61, 21.

<sup>11</sup>*British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, 1999 3 SCR 3

<sup>12</sup>*Association of Professional Engineers and Geoscientists of Alberta v Mihaly*, 2016 ABQB 61, 22.

employer did not establish it would experience burden changing their evaluation methods. On the other hand, in Mr. Mihaly's case, the FE exam does not show a disproportionate impact on foreign applicants. Additionally, the exam demonstrates a knowledge of the basis of the engineering profession, and so is necessary to the evaluation of potential engineers. The Queen's Bench sided with APEGA's appeal, and claimed that "it is clear his conclusions regarding accomodation falls outside the range of acceptable outcomes that are defensible in light of the facts and law; and as such was unreasonable."<sup>13</sup>

In all, Honorable Madam Justice J.M. Ross concluded that "the decision of the Tribunal should be reversed. There is no need, in the circumstances, to remit the matter back to the Tribunal."

### **Reflection and Opinion**

Through careful analysis of the issue and consideration of all parties, we disagree with the ruling of the Alberta Human Rights Commission and agree with both the Court of Queen's Bench and the Alberta Court of Appeal. Although Mr. Mihaly was certainly in an unfortunate position that may have potentially hindered his career as a professional engineer, the fault can not be attributed to poor candidate evaluation procedures or discrimination by APEGA.

Mr. Mihaly's complaint about discrimination creates a very interesting problem. Although it is reasonable for APEGA to require prospective engineers from foreign countries to take confirmative examinations, the fact that the same level of engineer from one country can be admitted more easily than from another country opens the door to questions regarding discrimination. However, upon examining the statistics for foreign applicants to APEGA, it can be seen that, within the limited resources available to the association, a great effort is being made to integrate all foreign applicants. Of the 1500 international applications annually, 60% are registered with no issues. Another 15% have sufficient experience in engineering to have examinations waived. Only 25% of applicants are assigned to the Fundamentals of Engineering (FE) or conformational exams<sup>14</sup>. However, even in the case of writing an FE exam, there is an 85% passing rate, and those who fail are given the option to rewrite<sup>15</sup>. In addition to a straightforward application system with high acceptance rates, APEGA also accepts Mutually Recognized Agreement programs with various countries. Through these agreements, more opportunities are offered for foreigners from institutions that meet APEGA standards.

Since Mr. Mihaly didn't qualify for any automatic APEGA exemptions, he was part of the 25% that had to write conformational exams in order to obtain his license. These exams are standardized in order to provide a fair, consistent method of evaluation to determine whether a candidate is qualified to practice engineering in Canada. Mr. Mihaly wrote these exams on three separate occasions, failing each time. Instead of discrimination, him failing to complete a high

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<sup>13</sup>*Association of Professional Engineers and Geoscientists of Alberta v Mihaly*, 2016 ABQB 61, 26.

<sup>14</sup>*Association of Professional Engineers and Geoscientists of Alberta v Mihaly*, 2016 ABQB 61, 24.

<sup>15</sup>*Association of Professional Engineers and Geoscientists of Alberta v Mihaly*, 2016 ABQB 61, 22.



passing rate exam on multiple attempts could also be interpreted as potential incompetence in his area of practice. In this interpretation, APEGA has done its job of ensuring a high quality of engineering to protect public safety. To our group, it seems rather irresponsible for the Tribunal to request APEGA to not only reconsider a candidates application for the fourth time, but to adjust the standardized testing procedure to give Mr. Mihaly a potential advantage.

As a group, we are strongly against the notion proposed by the Tribunal that APEGA should accommodate foreign-trained engineers and geoscientists. Not only do we believe a test to confirm a candidate has prerequisite knowledge to be completely reasonable, we also agree with the idea that the expectation of institutions to provide additional testing methods and mentorship to foreign applicants violates previous legal precedent<sup>16</sup>, as mentioned by Justice J.M. Ross.<sup>17</sup> To establish justification for a change of standards, the new standard must be reasonable in that “the defendant cannot accommodate persons with the characteristics of the claimant without incurring undue hardship.”<sup>18</sup> As mentioned above, there are on average, 375 APEGA applicants every year that must write a form of examination. To provide multiple different methods of evaluation for these candidates and to provide mentorship for 375 individuals is a definite resource burden on APEGA and is unreasonable to force onto the association.

As a whole, the case study of Mr. Mihaly offered a very compelling perspective regarding the technicalities of professional licensing. It is the duty of APEGA to uphold the quality of work and the safety of the public. However, with limited resources, this often means a few individuals may not be fairly treated with respect to their academic merits. That being said, this cannot be defined as intentional discrimination and APEGA should not hold any blame. Instead, it is up to APEGA to create a system of evaluating the engineering competency of all applicants, and, in this respect, our group believes the association succeeds. Although the case of Mr. Mihaly is regrettable, the Court of Queen’s Bench and later on, the Alberta Court of Appeal made the correct decision in upholding the status quo of professional engineering licensing.

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<sup>16</sup>*British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, 1999 3 SCR 3

<sup>17</sup>*Association of Professional Engineers and Geoscientists of Alberta v Mihaly*, 2016 ABQB 61, 19.

<sup>18</sup>*British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, 1999 3 SCR 3, para 54, 176

## References

“About APEGA.” APEGA, [www.apega.ca/about-apega/](http://www.apega.ca/about-apega/).

*Mihaly v. The Association of Professional Engineers, Geologists and Geophysicists of Alberta*, 2014 AHRC 1

*Association of Professional Engineers and Geoscientists of Alberta v Mihaly*, 2016 ABQB 61.

*Mihaly v Association of Professional Engineers and Geoscientists of Alberta*, 2017 ABCA 15.  
*Moore v. BC (Education)*, 2012 SCC 61.

Cotter, John. “Alberta Court of Appeal won't restore foreign-Trained engineer's appeal.” CBCnews, CBC/Radio Canada, 13 Jan. 2017, [www.cbc.ca/news/canada/calgary/ladislav-mihaly-engineers-alberta-foreign-1.3933845](http://www.cbc.ca/news/canada/calgary/ladislav-mihaly-engineers-alberta-foreign-1.3933845).

Tribunal, Human Rights. “Law Library - BC Human Rights Tribunal.” The test for discrimination - Leading Cases, [www.bchrt.bc.ca/law-library/leading-cases/discrimination.htm](http://www.bchrt.bc.ca/law-library/leading-cases/discrimination.htm).

“What is the difference between Provincial Court and Court of Queen’s Bench?”. Alberta Justice and Solicitor General, [https://justice.alberta.ca/programs\\_services/courts/Common%20Questions%20Library%20%20Courts/WhatIsTheDifferenceBetweenProvincialCourtAndCourtOfQueensBench.aspx/DispForm.aspx?ID=3](https://justice.alberta.ca/programs_services/courts/Common%20Questions%20Library%20%20Courts/WhatIsTheDifferenceBetweenProvincialCourtAndCourtOfQueensBench.aspx/DispForm.aspx?ID=3)