

Case Study: APEGA's Appeal of Mihaly

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Introduction

The purpose of this report is to provide greater insight into the requirements for register as a Professional Engineer through APEGA's strictly regulated process. The analysis of APEGA's appeal of Mihaly case study is to become more familiar with the legal and quasi-legal environment in which APEGA operates. APEGA have very strategic regulations put in place regarding individuals with engineering degrees from universities on the Foreign Degree List. These regulations are decided by APEGA's Board of examiners, along with the help of the Canadian Engineering Qualification Board, who make recommendations for the qualifications required of the applicants.

This case investigates the complaint filed against the Association of Professional Engineers and Geoscientists of Alberta (APEGA) by Mr. Ladislav Mihaly with the aid of Alberta Human Rights Commission. Mr. Mihaly began his registration as a Profession Engineer through APEGA. As he immigrated to Alberta from Czechoslovakia, he was asked to write confirmatory examinations or the FE Exam to ensure his education met the requirements of APEGA. Mr. Mihaly claimed the exams were assigned to him based on his place of origin constituted discrimination. This case was appealed to three different group, first to the Alberta Human Rights Commissions, then The Court of Queen's Bench, and finally the Alberta Court of Appeal.

Stakeholders

APEGA

The Association of Professional Engineers and Geoscientists of Alberta (APEGA), is an organization which regulates the practices of engineering and geoscience, and has significantly contributed to Alberta's economic success and professional practice. They govern through the Engineering and Geoscience Professions Act set by the Government of Alberta. APEGA was accused of discrimination against an individual of his place of origin when it denied him registration as a professional engineer. APEGA is directly affected by the outcome of this case, as its regulations are at risk; the regulations are specifically put in place to govern immigrants who wish to continue practicing engineering in Alberta, for example the National Professional Practice Exam (NPPE) and three confirmatory examinations. This case may lead to the change of APEGA's qualification assessment of engineers within Canada. However, APEGA's actions will also directly affect Mr. Mihaly's future as an engineer in Canada; whether he can be exempted from taking the three confirmatory examinations plus the (NPPE).

The Court of Queen's Bench

In Alberta, The Court of Queen's Bench is the Superior Trial Court for the province. The court is involved in trial cases of civil and criminal matters and makes decisions based on the Provincial Court. The Court of Queen's Bench are also responsible for Surrogate Matter, which the probate and administration of estate matters fall under. The Court of Queen's Bench is a key stakeholder in this case because it has the power to overturn Mr. Mihaly's case and rule in favour of APEGA. As the Court of Queen's Bench overarches the AHRT, it can defend APEGA for not paying Mr. Mihaly \$1,000,000 for lost wages and registration. The Court of Queen's Bench looks at the

overall issue of the case, whereas, AHRT focuses on the fact Mr. Mihaly claims APEGA was discriminating against his place of origin.

The Alberta Human Rights Commission

The Alberta Human Rights Commission(Tribunal) is a tribunal board human rights body for Alberta. The Alberta Human Rights Act protects Albertans from cases of discrimination. This act establishes the Alberta Human Rights Commission. The purpose of the act is to ensure Albertans, Canadian citizen or not, are offered an equal chance to make a living, and use the government services without discrimination. In the Mr. Mihaly's case, he appealed to the Tribunal regarding the discrimination he was faced by APEGA. In return the Tribunal grants Mr. Mihaly \$10,000 for general damage for the case, and demands APEGA to reconsider Mr. Mihaly's application. The Tribunal did not have full understanding of the case before making those decisions. To the Tribunal, the case seemed like a discrimination case as claimed by Mr. Mihaly. However, diving deeper into the details of the case, it appears that Mr. Mihaly was put through APEGA's regular application process for IEG.

Mr. Ladislav Mihaly

Mr. Mihaly is the respondent in this case study. He was born in the former Czechoslovakia and obtained a M. Sc. Diploma with a specialization in Technology of Fuels and Thermal Energy in Bratislava and a Certificate in Corrosion Engineering in Prague. After immigrating to Canada, Mr. Mihaly applied to APEGA for registration as a Professional Engineer. With his degree listed on the Canadian Council of Professional Engineers Foreign Degree List, he was required to take exams to ensure his education is aligned with APEGA regulations. Mr. Mihaly failed the NPPE three times and suggested that his education and experience was enough to qualify APEGA standards and should not be forced to take the exams. Mr. Mihaly complained to the Alberta Human Rights Commission regarding his concern of APEGA discrimination again his place of origin and refused to qualify him as a professional engineer without taking certain examinations. (APEGA v. Mihaly, 2016)

Dean David Lynch

Dr. David Lynch plays a key role as the expert witness for APEGA to establish regulations when evaluating engineers educated outside Canada who wish to register as Professional Engineers. He is a member of APEGA's Board of examiners which is responsible for assessing the qualification of Internationally Educated Graduates (IEGs), to which he provided testimony on international agreements and the evaluation of engineering programs outside of Canada. Dr. David Lynch was involved in setting the procedure for individuals who wishes to practice engineering in Canada. Dr. Lynch states that Canada has very strict rules to who is permitted to use the work "Engineer". With an increasing number of Internationally Educated Graduates (IEG), Canada is required to implement certain rule and regulations. (APEGA v. Mihaly, 2016).

Dr. Gary Faulkner

He is the Chair of APEGA's Board of Examiners, as well as a Board Member of the Canadian Engineering Qualification Board (CEQB). As a member of the Board of Examiners, Dr. Faulkner's role is to study the various qualifications of engineers in Canada and make suggestions to the engineering groups of each province. However, the provinces make the final call on the individual's qualification. Dr. Faulkner defended APEGA by stating that the confirmatory exams are put into place as a way for APEGA to see the applicant's education. Because of different country's educational institutions, it is APEGA's duty to keep the public's safety first and ensure the applicants have the same knowledge of someone who graduated from a Canadian-accredited program. (APEGA v. Mihaly, 2016).

Mr. Mark Tokarik

Mr. Tokarik first joined APEGA as an Assistant Director of Registration and later became the Director of Registration. Now, he is the Deputy Registrar for APEGA. During his time as the Director of Registration, he was in charge of the registration process. At the same time, Mr. Tokarik was also a member of the Engineers Canada's Foreign Engineering Qualifications Committee (FEQC). This is evidence that Mr. Tokarik has years of experience working with the registration of professional engineers where he likely faced many different cases. APEGA receives about 1500 applications from Internationally Educated Graduates every year and only about 60 percent of the application do not require to write any exam in order to receive their title. A key testimony from Mr. Tokarik states if Mr. Mihaly thought he could be exempted from the exams due to his work experience he should have submitted a reconsideration request to APEGA, which he was sent. However, the request was not submitted by Mr. Mihaly. (APEGA v. Mihaly, 2016).

Background

On February 6, 2014 Mr. Mihaly filed a complaint to the Alberta Human Rights Tribunal stating that APEGA discriminated against his place of origin as it refuses to register him as a professional engineer. APEGA did not recognize Mr. Mihaly's previous engineering education as equivalent as Canadian Universities, and therefore requested him to take National Professional Practice Exam, three confirmatory examinations, and an exam in Engineering Economics.

Mr. Mihaly was born in Czechoslovakia. In 1975, he obtained a M.Sc. Diploma in Technology of Fuels and Thermal Energy from the Slovak Technical University in Bratislava (UBS). Later in 1981, he obtained a Certificate in Corrosion Engineering from the Institute of Chemical Technology (ICT) in Prague. In May 1999, Mr. Mihaly immigrated to Canada with his family, and he applied to be registered as a Professional Engineer with APEGA. However, because Mr. Mihaly's degrees are on the Foreign Degree List as regulated by the Canadian Council of Professional Engineers. Therefore, examinations are put into place to assess the applicant's degree to determine whether their education meets APEGA's standards. On January 17, 2000, Mr. Mihaly wrote his first attempt at the NPPE. On February 11, 2000, Mr. Mihaly received notice from APEGA that he had failed his first attempt at NPPE, and advised that he must complete all the required examinations prior to May 2001. On August 1, 2000, Mr. Mihaly again

applied to write the NPPE on October 16, 2000, however he was not present the day of the exam. This led to APEGA withdrawing Mr. Mihaly's application for the first time on June 29, 2001, since he's passed the required deadline. On May 31, 2002, Mr. Mihaly asked APEGA for his first reactivation, to which he explained that he was in a serious car accident and faced health problems after to which caused him to miss the exam, at this time, he also applied to write the NPPE a third time, on July 15, 2002. On June 3, 2002, APEGA reactivated Mr. Mihaly's file, and advised him to complete the exams by November 2003 in order to keep his file active. On July 15, 2002, Mr. Mihaly failed the NPPE exam, and applied to write on January 20, 2003, and failed. On August 1, 2003, APEGA withdrew Mr. Mihaly's file again, as he had failed to complete the exams before the deadline. On October 2, 2006, Mr. Mihaly asked APEGA to reactivate his application once again. Upon reviewing his application on August 10, 2007, the Board of Examiners decided that Mr. Mihaly is required to take the three confirmatory examinations, along with a course or examination in Engineering Economics, or the Fundamentals of Engineering Examination (FE Exam). This time the Board also stated that Mr. Mihaly had yet to gain the one-year D level experience of Canadian professional engineering. (APEGA v. Mihaly, 2014).

On August 5, 2008, Mr. Mihaly filed a complaint to the Alberta Humans Rights Commission, claiming that APEGA was discriminating towards his place of origin when he requested to be registered as a professional engineer, and was denied. The Tribunal's decision was to give Mr. Mihaly \$10,000 in general damage due to the case. As for APEGA, the Tribunal orders Mr. Mihaly's application to be re-evaluated, and also for APEGA to have a committee to re-access and use "individual assessment options to Mr. Mihaly with a view to correcting any perceived academic deficiencies." The Tribunal also instructed APEGA to assign a committee to personally re-evaluate Mr. Mihaly's education background, to determine whether he is more qualified than previously stated, and the possibility of examination exception. APEGA and the committee are then to provide any support Mr. Mihaly requires, such as pairing him with a mentor to assist him during the registration process, and provide Mr. Mihaly connections into the industry. However, the Tribunal denied Mr. Mihaly's request to be paid the lost wages during the case. (APEGA v. Mihaly, 2016)

APEGA appealed to The Court of Queen's Bench regarding the finding of discrimination by the AHRT. Upon reviewing AHRT's decision on the case, The Court of Queen's Bench overturned the decision, and dismissed Mr. Mihaly's cross appeal. A couple convincing facts lead to the court's decision. Firstly, when AHRT failed to ask to bring forth the Engineering and Geoscience Professions General Regulation, it showed that AHRT did not breach the rules of procedural fairness. Secondly, due to the case is about discrimination of individual's "place of origin of academic qualification", AHRT was inadequate in jurisdiction to make decisions on the case. Thirdly, due to the absence of supporting evidence of AHRT's incompetence in applying the Moore Test with respect to NPPE and Canadian experience requirements, Justice Ross dismissed ARHT's findings of prima facie discrimination on the grounds of being unreasonable. (APEGA v. Mihaly, 2016)

Mr. Mihaly filed his appeal with the Alberta Court of Appeal on February 22, 2016, however, he failed to complete the application correctly and failed to further perfect the appeal, it was struck off on June 23, 2016, for failure to file the complete Appeal Record. On December 12, 2016 Mr.

Mihaly filed to restore the appeal, however in order for an appeal to be restored a number of factors must be considered. The appellant must have an explanation for the defect or delay of the application which caused the appeal to be taken off; a debatable merit to the appeal; there is an intention to proceed with the appeal upon restoration; immediate actions are in place once the appeal is restored; and lastly, there is no bias towards the respondent. Upon evaluating the depending factors to restore the appeal, Mr. Mihaly failed to meet the requirements, and his application was dismissed. (APEGA v. Mihaly, 2016)

The Court of Queen's Bench Decision

After the decision was made by the Alberta Human Rights Tribunal (AHRT), several issues were raised by APEGA regarding the conclusion: procedural fairness, jurisdiction, *prima facie* discrimination, and justification. The Court of Queen's Bench assessed APEGA's appeal of the Tribunal's findings and made a final ruling for the case (APEGA v. Mihaly, 2016).

The question raised by APEGA is whether the Tribunal breached the rules of procedural fairness by making decisions without the consultation of the parties involved. When the Tribunal made an unreasonable interpretation of Engineering and Geoscience Professionals General Regulation (EGPR), section 8, APEGA submits the organization was not given an opportunity to address the issue. Based on the *Pope & Talbot Ltd v. British Columbia* case, the failure of the tribunal to question the parties does not constitute a breach of procedural fairness. APEGA had opportunities to respond to the Tribunal for all evidence and submissions. Therefore, the Court of Queen's Bench concluded that the Tribunal has not breached the rules of procedural fairness. (APEGA v. Mihaly, 2016)

Second, the jurisdiction of the Tribunal when dealing with discrimination based on where a person receives their education is brought into question. APEGA submits the Alberta Human Rights Act (AHRA) does not cover discrimination based on the place of origin of academic qualifications. "Place of origin", as outlined by the Court of Queen's Bench, does not cover the place of education. Therefore, APEGA claims the Tribunal had no jurisdiction to make a ruling on Mr. Mihaly's complaint. (APEGA v. Mihaly, 2016)

The main issue addressed by the court is whether the AHRT applied the correct legal test for *prima facie* discrimination. The *Moore* test, which requires complainants to demonstrate that they have a characteristic protected from discrimination, experienced an adverse impact, and the protected characteristic was a factor in the adverse impact, was correctly applied to determine if an adverse discrimination case is justified. From the findings presented, the court concluded the Appellant has not established that the AHRT lacked the jurisdiction in the hearing of the case. (APEGA v. Mihaly, 2016)

According to the Tribunal, Mr. Mihaly undoubtedly suffered discrimination linked to his "place or origin" and experienced adverse impacts due to this factor. Further, the Tribunal states APEGA assumed foreign institution's engineering graduates were not up to par with Canadian engineering accreditation standards. However, this statement is not supported by the evidence. Accreditation requires complex and comprehensive systems and knowledge about the programs. Without undergoing this process, APEGA could not gauge the academic qualifications of

engineering graduates from foreign institutions, aside from Mutual Recognition Agreements (MRA). (APEGA v. Mihaly, 2016)

Without a doubt, the statement in which the Tribunal concluded that Mr. Mihaly's place of education is linked to his place or origin is correct as found by the court. The option to avoid writing the confirmatory examinations or the FE Exam was not available, thus leading to the adverse impact. However, the findings from the Tribunal which states APEGA's requirements perpetuate disadvantage to foreign engineering graduates is not sufficient based on the legal test. A prohibited ground of discrimination must be demonstrated to lead to an adverse impact in order to establish a case of substantive discrimination. The evidence did not sufficiently demonstrate Mr. Mihaly's national origin led to a disadvantageous impact he may have experienced. The National Professional Practice Exams (NPPE) is required for all APEGA applicants, and no evidence was found suggesting the exam excludes foreign engineering graduates from registering with APEGA. There was no basis for a finding that the requirement to pass the NPPE along with possessing one year of Canadian experience is linked to the prohibited ground of discrimination, as concluded by the Court of Queen's Bench. (APEGA v. Mihaly, 2016)

APEGA requires all applicants to have one year of Canadian experience to become familiar with Canadian codes and the way engineers work in various teams. No supported findings was found that this requirement held Mr. Mihaly at a disadvantage due to his place of origin when applying for potential jobs. The failure of the Tribunal in applying the *Moore* test in relation to the NPPE and Canadian experience requirements, and a lack of evidence supporting the fact that those elements were present, leads to the conclusion that the Tribunal's finding of *prima facie* discrimination unreasonable. (APEGA v. Mihaly, 2016)

The AHRT found that the requirements to write confirmatory examinations or the FE Exam is a case of *prima facie* discrimination. This finding is based on unfamiliarity with the EGPR and the Tribunal did not seek submissions from the parties, leading to the unreasonable interpretation of the EGPR, section 8. With the large number of international engineering programs, coupled with the fact that accreditation requires significant time and effort, APEGA lacks the resources to negotiate agreements with all institutions. Thus, examinations are used to assess the quality of the undergraduate engineering programs. They have been proven to be consistent with the EGPR and ensures the competency of the graduates. As a result, the Tribunal's interpretation of the section was unreasonable as the examinations required by Mr. Mihaly were not for correcting a perceived academic deficiency as required by section 8. (APEGA v. Mihaly, 2016)

There is no evidence that international educated graduates with entry-level competence face difficulties when writing the FE Exam. The tests are developed to assure competency of practicing engineers and ensure public safety. The Tribunal comments that foreign-trained graduates are expected to demonstrate that their education on at par with Canadian graduates. However, the Court concluded that the graduates are expected to possess knowledge required to perform in their profession. (APEGA v. Mihaly, 2016)

For APEGA applicants who have completed a graduate degree at a Canadian university or an MRA country, or if they have ten years of progressive engineering experience, APEGA may

assess the individual to determine whether examinations are necessary. In this case, Mr. Mihaly did not meet either of the above requirements. An internal appeal of this decision was not pursued by Mr. Mihaly during the Tribunal's decision. From previous information gathered, 60 percent of applicants are registered with no issues, 25 percent write the FE Exam or confirmatory examinations, and 15 percent have adequate experience to waive the exams. (APEGA v. Mihaly, 2016)

In addition, the AHRT ordered APEGA to establish a committee including foreign trained engineers to explore options to appropriately assess Mr. Mihaly's qualifications. APEGA was also directed to match Mr. Mihaly with a mentor to provide guidance on integrating into the profession. This accommodation would have adverse impacts for APEGA, altering its standards and requiring the organization to act outside of its regulatory role. In addition, the Tribunal did not consider Mr. Mihaly's obligation in searching for possible accommodations, as he failed to attempt the three confirmatory examinations or the FE Exam. (APEGA v. Mihaly, 2016)

The Court has found the Tribunal's decision for this matter to be rife with logical errors, findings of facts not supported by evidence, and failure to account for relevant considerations. From the misinterpretation of the EGPR, unsupported assumption of the FE Exam excluding foreign trained engineers, failure to realize entry level engineering competence is necessary as a professional engineer, and inconsideration of relevant factors in the undue hardship assessment, the reasonings for the accommodation is therefore unreasonable. The conclusion from the Tribunal that *prima facie* discrimination has been established by APEGA's confirmatory examinations or the FE Exam is unreasonable as it failed to justify the decision under section 11 of the AHRA. (APEGA v. Mihaly, 2016)

With respect to the appeal, the Court of Queen's Bench sought a full reversal of the decision by the AHRT and will not remit the matter back to the Tribunal. (APEGA v. Mihaly, 2016)

Reflection and Opinion

Based on the AHRT's finding, the Tribunal concluded the system for evaluating Mr. Mihaly's credentials constituted systematic discrimination. They directed APEGA to re-evaluate Mr. Mihaly's application and awarded damages of \$10,000 for injury to dignity. In addition, APEGA was to create a committee to assist in helping foreign-trained engineers settle into the Canadian profession as well as match Mr. Mihaly with a mentor (Casey, 2017). In my opinion, the decision by the Tribunal was unreasonable given Mr. Mihaly circumstances.

Before the filing of the human rights complaint, Mr. Mihaly had written the NPPE three times and failed all three times. In addition, none of the confirmatory or FE Exams were attempted by him. Passing the NPPE is required for all APEGA applicants, even for engineering graduates within Canada. This treats all potential Professional Engineers as having the necessary qualifications, even for international graduates. Exams like the NPPE, confirmatory examinations and the FE Exam are methods in which APEGA can quantifiably assess the skills and competency of individuals to ensure public safety. With most international engineering applicants passing the NPPE exam, this demonstrates APEGA's system for evaluating

applicant's credential to not be discriminatory. Instead, the quality of Mr. Mihaly's skills are not up to the standards held by APEGA to be registered as a Professional Engineer.

In response to the Tribunal's findings, the Court of Queen's Bench decided to overturn the decision of the Tribunal. The reasons being decisions "rife with logical error", "findings of facts not supported by the evidence", and "failures to take into account relevant considerations" (APEGA v. Mihaly, 2016). Based on the evidence provided by the Court of Queen's Bench and the lack of evidence from the Tribunal, I agree with the decision to overturn the Tribunal's conclusions with regards to Mr. Mihaly. The Court addressed the legal failings of the AHRT's analysis conducted without a basis (McKay-Panos, 2016).

Many of the findings from the Tribunal lead to conclusions that did not have evidence to support the fact. For example, the Tribunal states "APEGA's policies are based on discriminatory assumptions" (APEGA v. Mihaly, 2016) while describing the complex and comprehensive process involved in accrediting a program meaning it is not based on assumptions. In another instance, the Tribunal assumes "the FE Exam would have a disproportionate impact on foreign educated applicants" (APEGA v. Mihaly, 2016) which would exclude them from registering with APEGA. Again, no evidence is available that supports the assumption that internationally educated graduates will have difficulty passing their respective FE Exam.

The Tribunal's conclusion also fails to take into account APEGA's role as a professional regulatory body. The organization's main role is to regulate the profession and ensure that qualified individuals registering as Professional Engineers have the necessary qualifications and skills to safely perform the task of the profession. Requiring APEGA to assemble an additional committee along with providing a mentor for Mr. Mihaly is clearly outside of the scope of the regulatory body. In addition, there are many international applicants to APEGA every year. APEGA does not have the capacity to individually assess each applicant and making this accommodation would hinder the organization's ability to fulfill its main purpose.

An appeal was submitted by Mr. Mihaly to the Court of Appeal after the conclusion from the Court of Queen's Bench. However, the appeal was struck down due to Mr. Mihaly not finding any patent errors in the Court's decision (APEGA v. Mihaly, 2017). I agree with the Court of Appeal's decision block Mr. Mihaly's appeal from proceeding. Many opportunities were available for Mr. Mihaly to perfect his appeal, but they were not taken. Mr. Mihaly did not present any strong points indicating an error in the judgement of the Court of Queen's Bench in his appeal application.

There are high numbers of international engineers and geoscientists that apply for APEGA membership annually. Normally, there are options these individuals have in order to be granted membership such as writing confirmatory examinations or FE Exams, or proving they have adequate experience in the profession. In previous years, it has been shown APEGA's current system has been effective in testing the competency of applicants. However, each individual is different so it is always difficult to base everything on a standardized test which some international engineering graduates would have to take. They may have specialized skills or experiences that they developed in their place of origin and can bring to Alberta which can be difficult to identify with standardized testing. For most situations, I do not feel APEGA has the need to

accommodate for foreign-trained engineers and geoscientists. This is based on the past success of international applicant's registration with APEGA.

For special circumstances, APEGA should still provide waivers to the applicants in special circumstances. For example, if they can prove their skills and qualifications in a way which does not require completing the confirmatory examination or FE Exam or having ten years of progressive engineering experience, waivers may potentially be applied. This approach would require individual assessments for these cases. With this approach, it does not require all international engineering graduates to be separately assessed. Thus, time and effort from APEGA's side can be saved. This provides a balance for individuals from a wide range of backgrounds and can ensure the majority of the applicants are assessed fairly (McKay-Panos, 2016).

Reference

Association of Professional Engineers and Geoscientists of Alberta v Mihaly (Court of Appeal of Alberta January 12, 2017).

Association of Professional Engineers and Geoscientists of Alberta v Mihaly (Court of Queen's Bench of Alberta January 26, 2016).

Association of Professional Engineers and Geoscientists of Alberta v Mihaly (Human Rights Tribunals of Alberta February 6, 2014).

McKay-Panos, Linda. "Alberta Court of Queen's Bench Overturns Discrimination Decision on Foreign Trained Engineer." *ABlawg*, University of Calgary Faculty of Law, 23 Mar. 2016, ablawg.ca/2016/03/23/alberta-court-of-queens-bench-overturns-discrimination-decision-on-foreign-trained-engineer/.