

ENGG 513: The Role and Responsibilities of  
the Professional Engineer in Society  
Winter 2018

**Mihaly v. APEGA Case Study**

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Date: February 16th, 2018  
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## **1.0 Introduction**

The following report concerns with the conduct of Mr. Ladislav Mihaly, Alberta Human Rights Commission (Tribunal), Association of Professional Engineers and Geoscientists of Alberta (APEGA), Court of Queen's Bench and, Alberta Court of Appeal. Mr. Mihaly had filed a complaint to Tribunal that APEGA discriminated against him regarding his application as a professional engineer in Alberta. The Tribunal found that APEGA refused to recognize his education as the equivalent of an engineering degree from an accredited Canadian University, and requested him to write certain examinations to confirm his academic credentials [1]. APEGA filed an appeal to the Court of Queen's Bench against the Tribunal decision which has been issued on February 6, 2014. The decision made by the Court of Queen's Bench was to dismiss the Tribunal decision in the allegations made by Mr. Mihaly. Mr. Mihaly's application to the Alberta Court of Appeal has been dismissed as a Court decision which concluded that Mr. Mihaly could not prove any error in the Court of Queen's Bench decision. The case displays the strong endorsement of APEGA's system to evaluate credentials of internationally educated credentials. The report will comment on the decisions made by the Tribunal, the Court of Queen's Bench, and the Alberta Court of Appeal. The report is done to discuss impact of the decision made by the organizations involved in the process of Mr. Mihaly alleged complaint regarding the discrimination he received from APEGA Board of Examiners based on his country of origin. The case displays the strong endorsement of APEGA's system to evaluate credentials of internationally educated credentials.

## **2.0 Stakeholders**

Stakeholder is an individual or group that has an interest in any decision or activity of an organization [2]. In this case study, the primary stakeholders will be the person or organizations that were directly involved in Mr. Mihaly's unprofessional conduct. The primary stakeholders and the key associated with this issue are as below.

### **2.1 Mr. Ladislav Mihaly**

Applied to APEGA to be registered as a professional engineer in Alberta. Mr. Mihaly filed a human rights complaint to the Tribunal alleging discrimination based on place of origin after his several applications were withdrawn. Filed an appeal to the Alberta Court of Appeal when the Tribunal decision was reversed by the Court of Queen's Bench, but his appeal was dismissed.

### **2.2 The Alberta Human Rights Commission (Tribunal)**

Reviewed a discrimination complaint filed by Mr. Mihaly to APEGA. Provided general damages of \$10,000 to Mr. Mihaly and forwarded an order to APEGA to reconsider the application, appoint a mentor to guide him into the engineering profession, and directly assist him for networking and language resources [3].

### 2.3 APEGA

Appealed against the Tribunal decision issued on February 6, 2014 to the Court of Queen's Bench in relation to the allegation of discriminating against Mr. Mihaly. APEGA had determined that Mr. Mihaly required several confirmatory examinations to be registered as a professional engineer. The concern in the appeal was to review the undisputed evidence from Mr. Mihaly and the Tribunal.

### 2.4 The Court of Queen's Bench

Reversed the Tribunal decision in relation with APEGA's appeal. Honourable Madam Justice J.M. Ross concluded that the decision was due to the unsupported evidence provided by Mr. Mihaly and the Tribunal regarding the discrimination complaint towards APEGA. Refused to accept Mr. Mihaly's support materials to reconsider the decision once the decision has been made and finalized.

### 2.5 Dr. David Lynch

First witness, Member of Canadian Engineering Accreditation Board (CEAB) reviewed that Canada and other countries with equivalent accreditation processes for engineering programs may enter into Mutual Recognition Agreement (MRA), which generally will not be assigned examinations by APEGA. The Slovak Technical University of Bratislava has never applied to CEAB and therefore, has not been assessed as Substantially Equivalent Program.

### 2.6 Dr. Gary Faulkner

Second witness, Chair of the APEGA Board of Examiners (BOE) testified that Mr. Mihaly's Master's degree is equivalent to a Bachelor's degree of Chemical Engineering rather than Mechanical or Petroleum Engineering.

### 2.7 Mr. Mark Tokarik

Third witness, Deputy Registrar for APEGA provided further evidence of Mr. Mihaly's application and testified that an applicant from a university in Slovakia would be assigned FE exam or five confirmatory examinations. Examinations may be waived if the applicant has an acceptable Masters or Ph.D. or ten or more years of acceptable work experience.

### 2.8 The Alberta Court of Appeal

Reviewed an appeal filed by Mr. Mihaly regarding the decision made by the Court of Queen's Bench. Justice Frans Slatter dismissed the application since the Alberta Court of Appeal found that Mr. Mihaly could not point to any patent error on the decision made by the Court of Queen's Bench.

### 3.0 Background

Mr. Mihaly received his education in Czechoslovakia. In 1975, he obtained a M.Sc. Diploma with a specialization in Technology of Fuels and Thermal Energy from the Slovak Technical University in Bratislava. In 1981, he obtained a certificate in Corrosion Engineering from the Institute of Chemical Technology in Prague.

On May 1999, after immigrating to Canada, Mr. Mihaly applied to APEGA to be registered as a professional engineer. On February 11, 2000, APEGA's Board of Examiners (BOE) acknowledged his application and advised him that he must pass the National Professional Practice Exam (NPPE), complete three confirmatory examinations and a course equivalent in Engineering Economics by May 2001. Mr. Mihaly failed his first attempt at the NPPE on January 17, 2000. He reapplied to write the NPPE for a second time on October 16, 2000. However, he did not show up on the day of his test. On June 29, 2001, APEGA advised Mr. Mihaly that his application was withdrawn since he failed to write the required confirmatory examinations by May 2001. Mr. Mihaly reactivated his application for registration and reapplied to write the NPPE twice on July 15, 2002 and January 20, 2003, and he failed on both attempts. His application was again withdrawn as Mr. Mihaly had not written the required confirmatory examinations within the period specified by APEGA. On October 18, 2006, Mr. Mihaly's application has been reactivated for a third time and APEGA requested an updated resume and a list of updated references from him. On August 10, 2007, the BOE again advised him to write the required confirmatory examinations or the Fundamentals of Engineering Examination (FE Exam). The Board also determined that Mr. Mihaly had not acquired a position at a D level Canadian professional engineering experience for one year after immigrating to Canada.

On August 5, 2008, Mr. Mihaly forwarded a complaint with the Tribunal, pursuant to the Alberta Human Rights Act, RSA 2000, c A-25.2 (AHRA), accusing that APEGA discriminated against him based on his country of origin after his application as a professional engineer has been rejected multiple times. On February 6, 2014, the Tribunal found that Mr. Mihaly's background meets the *Examination Standard* and the *Experience Standard* by APEGA to assess his educational credentials without having individualized assessment as equivalent to discrimination that cannot be justified under the AHRA: Tribunal Decision, at para 242 [3]. The Tribunal ordered APEGA to Mr. Mihaly \$10,000 in compensation and further ordered to reconsider his application. APEGA were required to lead Mr. Mihaly through his application by appointing a committee to assist him, a mentor to guide him in integrating into the engineering profession, and directing Mr. Mihaly to networking and language training resources. The Tribunal decision was under appeal by APEGA and cross-appeal by Mr. Mihaly.

On November 20, 2014, APEGA filed an appeal to the Court of Queen's Bench of Alberta meanwhile, Mr. Mihaly filed a cross-appeal requesting for \$1,000,000 for lost wages if registered with APEGA or \$2,000,000 if not registered with APEGA, at para 2 [4]. The Court of Queen's Bench decision was to reverse the Tribunal decision. Court found that in *Association of Professional Engineers and Geoscientists of Alberta v Mihaly*, 2016 ABQB 61, 30 Alta LR (6th) 125, the Tribunal decision was 'rife with logical errors, findings of fact unsupported by the evidence, and failures to take into account relevant considerations' as concluded at para 149 [5]. Therefore, the Court of Queen's Bench decision was to dismiss Mr. Mihaly's cross-appeal. Mr. Mihaly attempted to have the decision reconsidered by providing materials to support his application but refused by the Court of Queen's Bench.

On February 22, 2016, Mr. Mihaly forwarded an appeal to the Alberta Court of Appeal but his appeal was withdrawn on June 23, 2016 since he failed to file the Appeal Record. Mr. Mihaly applied to the Court of Appeal to restore his appeal on December 15, 2016. Mr. Mihaly filed a complaint towards the Court of Queen's Bench decision. Alberta Court of Appeal found that it was not an error for the Court of Queen's Bench to refuse to Mr. Mihaly's request for reconsidering the decision once the appeal was commenced [5]. The complaint made by Mr. Mihaly was filed with the Tribunal has been ongoing since August 2008 and therefore, APEGA is entitled to have some finality to this issue, which questions its procedures for evaluating foreign credentials. It was Alberta Court of Appeal decision to dismiss Mr. Mihaly's application by Justice Frans Slatter because Mr. Mihaly did not find any patent error in the Queen's Bench decision and did not met the test for restoration of his appeal. Therefore, it proves that APEGA's system demonstrates a compelling endorsement to assess international education credentials.

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

On January 26, 2016, Madam Justice June Ross upheld APEGA's appeal and reversed the decision of the Tribunal [4]. The cross- appeal by Ladislav Mihaly demanding for \$1,000,000 for lost wages and registration with APEGA, or \$2,000,000 if not registered with APEGA was also dismissed.

The standard review for the case was discussed in paras 46 to 53. The governing standards of reviews in this case relates to the questions of procedural fairness if it meet the level of fairness required by law, question of law concerning the interpretation of the *Alberta Human Rights Act*, RSA 2000, c A-25.5 [AHRA], the test for *prima facie* discrimination, and the lack of evidence to support the Tribunal decision. The issues on the appeal by the appellant are outlined as below.

The Appellant raises the following issues [1]:

1. Procedural fairness: Did the Tribunal breach the rules of procedural fairness when he decided issues that were not raised by or with the parties?
2. Jurisdiction: Did the Tribunal err when he held that he had jurisdiction to determine whether discrimination based on the place a person receives their education constitutes discrimination based on place of origin?
3. *Prima facie* discrimination: Did the Tribunal rely on the correct legal test and reasonably apply that the test, to determine whether Mr. Mihaly had demonstrated *prima facie* discrimination?
4. Justification: Was the Tribunal's decision that APEGA's registration requirements were unjustified unreasonable?

On the issue regarding to procedural fairness, Madam Justice Ross concluded that the Appellant did not breach the rules of procedural fairness when the interpretation of the *Engineering and Geoscience Professions General Regulation*, Alta Reg 150/1999 (*EGPR*), section 8 has not been submitted.

The Appellant has not established that the Tribunal lacked of jurisdiction to hear the case as Alberta Human Rights (AHRA) does not protect the discrimination complaint based upon the "place of origin of academic qualifications." The point addressed by APEGA was supported by the case of *Grover v Alberta (Human Rights Commission)*, (1997) AJ No 88 (Alta QB), aff'd 1999 ABCA 240 [Grover] [1] where The Tribunal declined to hold a hearing arguing that "place of origin" did not mean "place of birth" but "where you came from." The Court of Appeal had declined to comment on the jurisdictional question and Justice Ross decided that the jurisdiction issues in this case were more properly determined by the legal test for *prima facie* discrimination as set out in *Moore v British Columbia (Education)*, 2012 SCC 61 (*CanLII*).

Justice Ross's decision addressed whether the Tribunal had used and applied the correct test for *prima facie* discrimination, and whether the Tribunal was logical in concluding that the APEGA registration requirements were unreasonable and thus not justified. The conclusion of the test by Justice Ross is as follows:

[73] "Under the *Moore* test, establishing a *prima facie* case of adverse effect discrimination requires complaints to show that they have a characteristic that is protected from discrimination; that they experienced an adverse impact; and that the protected characteristic was a factor in the adverse impact..."

In applying the *Moore* test, the Tribunal has come to the decision that Mr. Mihaly has been discriminated against on the basis of “place of origin.” Mr. Mihaly was also adversely impacted by APEGA’s requirements that he had to complete confirmatory examinations of FEE. Hence, “place of origin” was a factor in the adverse impact experienced by Mr. Mihaly. There was no dispute regarding the Tribunal’s finding that Mr. Mihaly’s place of education was linked to his place of origin. The requirement to write confirmatory examinations of the FEE was an adverse impact related to Mr. Mihaly’s place of origin however Justice Ross stated that any substantive disadvantage from the requirement to pass the NPPE examination and possess one year of Canadian experience was not linked to the ground of discrimination. The Tribunal deduction that APEGA assumed engineers with foreign qualification and had no Mutual Recognition Agreement (MRAs) were not at par with Canadian engineering accreditation standards were not supported by the evidence.

Justice Rose concluded that the Tribunal’s failure to apply *Moore* test in relation to the NPPE and Canadian experience requirements, and the lack of evidence to support a finding that these elements were present, rendered the Tribunal’s finding of *prima facie* discrimination to be unreasonable (para 109) [4].

The finding constituting *prima facie* discrimination was subject to an analysis under AHRA section 11. The analysis was to see if the finding was reasonable and justifiable in the circumstances. To establish justification, the test requires the defendant to prove that [6]:

1. it adopted to the standard for a purpose or goal that is rationally connected to the function being performed;
2. it adopted to the standard in good faith, in the belief that it is necessary for the fulfillment of the purpose or goal; and
3. The standard is reasonably necessary to accomplish its purpose or goal, in the sense that the defendant cannot accommodate persons with the characteristics of the claimant without incurring undue hardship

The appeal mainly concerns on the Tribunal’s finding that APEGA did not reasonably accommodate Mr. Mihaly. The requirement to write confirmatory examinations that the Tribunal found was *prima facie* discriminatory and it was not justified on two grounds based on paragraph 118 [5], where it is stated that Mr. Mihaly should not have been required to write confirmatory examinations or the FE Exam, but only examinations to correct perceived academic deficiencies following an individualized assessment of his credentials; and that Mr. Mihaly should not have been required to write a standardized “one size fits all” examination, rather than being individually assessed.

Justice Ross deduced that there was no evidence internationally educated graduates with entry-level competence would have any difficulties passing the FEE with respect to the criticism of the requirement of standardized examination without individual assessment. At paragraph 135, she held that the “possession of entry level competence is reasonably necessary to safe practice as a professional engineer.”

Justice Ross concluded that the Tribunal had failed to consider relevant factors in the assessment of undue hardship (para 149) and the Tribunal’s conclusions of the APEGA regarding the alleged failure to accommodate Mr. Mihaly to the point of undue hardship were unreasonable. APEGA had met its onus to establish that any *prima facie* discrimination was reasonable and justified.

## **5.0 Reflection and Opinion**

The decision in *Mihaly v. APEGA* is considered as one of the most important regulatory cases in Canada in 2016. The complaint made by Mr. Mihaly, alleging discrimination based on place of origin filed against APEGA by Mr. Mihaly in 2008, has been investigated for almost over eight years. The decision by the Tribunal provides the needs of an individual applicant, meanwhile the decisions by the Court of Queen’s Bench and the Alberta Court of Appeal provide strong defenses for regulators.

The decision of the Tribunal was to award general damages of \$10,000 and order APEGA to reconsider Mr. Mihaly application. The Tribunal provided a settlement of complaints of discrimination filed by Mr. Mihaly in the area of applications and advertising regarding employment. The judgement made by the Tribunal was unreasonable as it is based on one information from the other. The issue of “procedural fairness” arises when the Tribunal allows both parties to file their case. The Tribunal decision has a two-fold mandate: to promote equality and to diminish equality [7]. The Tribunal owns the freedom to credit all evidence even if it is prejudicial and they have the rights to weight each piece of evidence (Alberta Human Rights Commission Procedural Manual, Evidence) [8]. Therefore, there is an issue of procedural fairness in the Tribunal decision since the decision was mainly based on Mr. Mihaly’s information. The Tribunal decision was unjustified as the Tribunal failed to holistically treat an issue from both parties with evidence.

The decision of the Court of Queen’s Bench was to reverse the decision of the Tribunal and dismiss the cross-appeal by Mr. Mihaly. In this case, Justice Ross’s decision seems to address legal failing of the Tribunal’s analysis regarding the alleged discrimination of Mr. Mihaly on the grounds of place of origin when APEGA refused to recognize his academic credential. The court decision is agreeable as the requirements imposed by the professional association were reasonable and justifiable under the Alberta human rights legislation. The



matter regarding Mr. Mihaly's cross-appeal is only related to remedy which dependent on *prima facie* and has not been justified under s 11 of the AHRA. Thus, the cross-appeal was also dismissed by the Court of Queen's Bench. The decision made by the Court of Queen's Bench is reasonably necessary in order to safe practice as a professional engineer.

The decision of the Alberta Court of Appeal was to dismiss Mr. Mihaly's application to file an appeal when the Tribunal decision was reversed by the Court of Queen's Bench. The decision made by the Court was reasonable since the issue arose could not be justified by Mr. Mihaly himself. The Court found that Mr. Mihaly did not point to any patent error on the decision made by the Court of Queen's Bench. "Even Canadian educational institutions must demonstrate the equivalency of their programs, and Canadian who receive foreign training must also demonstrate equivalency" [9]. It proves that the same standards apply to all applicants despite where their education are accredited. Lowering the standards used to assess the individual accreditation to be licensed could increase the safety risk in Alberta.

A conclusion that can be deduced is that APEGA should not accommodate foreign-trained engineers and geoscientists. As a licensed engineer or geoscientist, one must have a certain level of knowledge and skills that can be practiced independently, so that it will not put them at jeopardy during decision making. This is important in order to protect humans live so that no reckless decision can be made. Providing waivers in some circumstances for the requirement to meet competency assessment will strike balance between the need to ensure competency for individual from a wide range of backgrounds and the need for individual assessment. Thus, it is important for APEGA to make a strict decision regarding foreign- trained engineers and geoscientists. According to APEGA's CEO, Mark Flint, complaints regarding the examinations and assessment are rare and people who need to upgrade their technical or language skills are advised on what they need to do to progress. Rather it may be difficult for foreign to meet the requirement and more effort is needed. Moreover, it is compulsory for one to have a good proficiency in English language. In an organization, a good communication is the key to conduct professional relationships and also to practice rules of law and concepts of ethics [10]. An issue might lead to misunderstanding if someone could not properly translate or interpret which can affect the efficiency of an organization to work as a team. It is a good practice for APEGA to ensure that the engineers have a strong command of English by acquiring an English proficiency test before any further examinations. It would be a fair measure across the board to write further examinations in English. However, APEGA will have to make certain that foreign engineers are not discriminated against the fact that English were their second language. There should be no doubt that APEGA really understand the rules of law and ethics as engineers in Canada. To be able to treat every individual fairly does not mean equity. However, it is important to attain to those standard in order to ensure protect the public safety. As rules by the judge, the application process seems to be done fairly.

## References

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