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Mihaly Case Study

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# **Introduction**

This case study follows Mr. Ladislav Mihaly vs Association of Professional Engineers and Geologists of Alberta (APEGA). This started when Mr. Mihaly applied to APEGA to register as a Professional Engineer, based on previous education and experience abroad. This case study then follows the exchange between APEGA and Mr. Mihaly, the initial ruling of the human rights complaint against APEGA with the Alberta Human Rights Commission(AHRC), which entails that APEGA discriminated against him in relation to his application to be a Professional Engineer based on his place of origin. It then follows the decision by the AHRC, which was met by a subsequent appeal by APEGA to the Court of Queen’s Bench of Alberta. The Queen’s Bench of Alberta reversed the tribunals decision ruling that the exams that Mihaly was required to write are a reasonable and justifiable tool for confirming that applicants have the required knowledge to be a Professional Engineer, amongst other findings. (Ross, 2016, pg.3-6) Following this decision, Mihaly filed a Civil Notice of Appeal to the Alberta Court of Appeal which appealed the judge’s decision. Finally, a Court of Appeal was held, and they denied Mihaly’s application to restore the appeal. (Slatter, J.A., 2017, pg.2-4)

# **Stakeholder’s**

## APEGA

APEGA is the one of the main stakeholders in this case. APEGA represents the professional engineers and geologists in Alberta. They are the body that licenses professional engineers and geologists. They also set the practice standards, as well as develops the code of conduct and ethics that members and permit holders abide by. Alongside that, APEGA investigates and disciplines its members and permit holders, as well as investigating and taking action against the individuals and organization that practice without licenses or permits, or the use the protected titles without licenses or permits. They also provide services to members and permit holders to support them in their practices. (“About APEGA”, n.d.)

## The Court of Queen Bench in Alberta

The Court of Queen Bench in Alberta is a superior court of criminal jurisdiction, with the power to try any indictable offense under the criminal code of Canada. Generally, they only try the more serious criminal offenses (such as murder, manslaughter, drug trafficking or conspiracy to commit one of these offenses). This court is constituted by the Courts of Queen’s Bench Act. As they are a court of inherent jurisdiction, they also function as a primary forum of judicial review of government action in Alberta and hears statutory appeals from the decisions of certain provincial administrative tribunals. (“Jurisdiction and Governance”, n.d.)

## The Alberta Human Rights Commission

The Alberta Human Rights Commission strives to protect Albertans from discrimination in certain areas based on specific grounds. They are constituted by the Alberta Human Rights Act, with the purpose to ensure that all Albertans are offered an equal opportunity to earn a living, find a place to live, and enjoy services available to the public without any discriminations. A chief is appointed to oversee the commission and tribunals, and they are responsible for helping the Minster of Justice and Solicitor General informed about human rights issues, providing the members of the Commission with guidance regarding their tribunal hearings, or other functions. The chief also appoints members of the commission to serve on other human rights tribunals. The primary purpose of these tribunals is to help with complaint resolution and settlement. (“About the Commission”, n.d.)

## Mr. Ladislav Mihaly

Mr. Ladislav Mihaly was born in the former Czechoslovakia. He attended Slovak Technical University in Bratislava and obtained a Master’s in Science Diploma with a specialization in technology of thermal energy in 1975. He then went on to the Institute of Chemical Technology in Prague in 1981 to receive a Certificate in Corrosive Engineering. He immigrated to Canada in May of 1999 and applied to APEGA for registration as a Professional Engineer. (Ross, 2016, pg.3-6)

## Public

The public are a stakeholder in this issue as the public are at risk when the worst of engineers are unsafe or not to code (“Guidelines for Ethical Practice”, 2013). Organizations like APEGA are in place to avoid such circumstances, and to protect the code of engineers and geologists. (“About APEGA”, n.d.)

## Engineers Canada

Engineers Canada is a National organization of the provincial and territorial associations across Canada that regulate the professional practice and licensing of engineers. As the engineering profession is self regulated, Engineers Canada exists to support the provincial or territorial engineering regulatory bodies. They accredit undergraduate engineering programs and develop guidelines in the public interest. (“About Engineers Canada”, n.d.)

## National Council of Examiners for Engineering and Surveying (NCEES)

The NCEES is a non-profit organization that is dedicated to the advancement of licensure for engineers and surveying. Engineering programs that are not recognized by APEGA and do not fall under the Mutual Recognition Agreements (MRA) may be included on the Foreign Degree (FD) List. Graduates of programs on the FD are usually assigned 3 confirmatory exams by APEGA, or to do the Fundamentals of Engineering Examination (FE Exam). The FE exam is set by the NCEES in the U.S. and is compulsory in the US. For all people seeking Professional engineering title. The current preference of APEGA is to use the FE exam rather than other confirmatory examinations. This was due to the FE exam being a reliable benchmark for an undergraduate engineering program. (“About NCEES”, n.d.)

## The Alberta Court of Appeal

The Alberta Court of Appeal overlooks criminal appeals that come from the Provincial Court. They also hear both civil and criminal appeals from the Court of Queens’s Bench, along with hearing appeals from the administrative and board tribunals. The purpose of the Court of Appeal is not to re-try cases, but rather to review the record and resolve any errors or issues that were made on a decision. (“Role and Operation”, n.d.)

# **Background**

The history of this case starts with Mr. Mihaly’s initial application to APEGA in May of 1999, shortly after his immigration to Canada. The application was to register as a professional engineer. Shortly after that on the 13 of May 1999, Mr. Mihaly received a letter from APEGA acknowledging Mr. Mihaly’s application. APEGA then requested his transcripts and told him to write the National Professional Practice Exam (NPPE), as it is required of him. APEGA’s Board of Examiners looked over Mihaly’s transcript, and on February 11th, 2000 they advised him that he must pass three more confirmatory exams and take a course on Engineering Economics by May 2001. They also informed him that he failed his first attempt at the NPPE, which he had written on January 17th, 2000. On August 1st, 2000, Mr. Mihaly applied to write the NPPE for a second time on October 16th, 2000. Mr. Mihaly did not show up to write this test. On June 29th, 2001, APEGA informed Mr. Mihaly that his application as he failed to write all exams by the required date.

Nearly a year later, Mr. Mihaly asked APEGA to reopen his application, and to write the NPPE on July 15th, 2002. Mr. Mihaly failed this exam, now for the second time. (Ross, 2016, pg.3) Again, APEGA informed Mr. Mihaly that he was still required to write three confirmatory and pass the Engineering Economics course by May 2003 and November of 2003, respectively. Again, Mr. Mihaly attempted the NPPE on January 20th, 2003 and failed for a third time. As Mr. Mihaly also did not complete the courses required of him by the deadline assigned, APEGA closed his application.

In August of 2006, Mr. Mihaly requested his application be opened again. With the time gap being so long, APEGA requested an updated resume and a list of references. This information was provided November 17, 2006. On August 10th, 2007 the APEGA Board of Examiners reviewed his application and told him that he could either complete the three confirmatory exams and complete the engineering economics course, OR the Fundamentals of Engineering Exam. They also concluded that that Mr. Mihaly had not received one year of Canadian professional engineering experience in the position that he work in previously, therefore requiring him to get that experience. (Ross, 2016, pg.4)

On August 5th, 2008 Mr. Mihaly filed a complaint with the Alberta Human Rights Commission claiming APEGA had discriminated against him based on his place of origin when they denied his application. On February 6th, 2014 the Tribunal that review the case found that Mr. Mihaly had been discriminated, and that they awarded him with $10,000 in general damages and told APEGA to relook into his application. They also advised APEGA to form a committee to help him pass the test, either by hiring a mentor other language training courses, and/or offering a different combination of examinations. They also requested that they help with his networking skills. They also told Mr. Mihaly that wages that would have been lost during that time will not be awarded to him, as there was no evidence to back up that claim. This Tribunal decision was appealed by APEGA, and then also cross-appealed by Mr. Mihaly (Ross, 2016, pg.4). APEGA filed its appeal brief on November 20th, 2017 along with Mr. Mihaly. The Tribunal filed their paper work on the 28th of November. The initial court hearing was set for December 12, 2014 but was pushed back to the 23 and 24 of July 2015, due to the court requesting more information on legal issues such as: the test for *prima facie* discrimination; and the test for the defense of a *bona fide* occupational requirement. (Ross, 2016, pg.8)

The issues raised by APEGA during the appeal were: did the tribunal breach the rules on procedural fairness; did the tribunal determine whether the discrimination was based on the place of origin or the place that they received their education; did they rely on the correct legal for determining *prima facie* discrimination; and was the tribunal’s decision on APEGA’s registration requirements unreasonable. (Ross, 2016, pg.9)

On the 26th of January 2016, the Court of Queen’s Bench reviewed the case put forth and arrived at the conclusion that they should reverse the tribunals decision, saying that the confirmatory exams requested were a reasonable tool in confirming technical knowledge. About a month later on the 22nd of February, Mr. Mihaly filed a civil notice of appeal at the Alberta Court of Appeal appealing the judge’s decision. On June 23rd of 2016, the Court of Appeal told Mr. Mihaly that his appeal needed to be completed by filing the Appeal Record, which he later filed in December of 2016 (Mulder, P., 2017). On January 10-12 the appeal hearing was held, and the Court of Appeal denied Mr. Mihaly’s application to restore the appeal based on the circumstances of restoring his appeal, and the previous decision by the Court of Queen’s Bench of Alberta. (Slatter, J.A., 2017, pg.2-4)

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

The Court of Queen’s Bench reviewed the appeal put forth by APEGA. The issues raised by the appeal were: did the tribunal break rules of procedural fairness when the decided issues were not raised by both parties; did the tribunal make an error when he had the jurisdiction to resolve whether discrimination was based on the place of origin; or the place that they received their education. Also, whether the tribunal did a correct legal test on *prima facie* discrimination, and if the tribunals decision on APEGA’s registration requirements are unreasonable. (Ross, 2016, pg.9)

The question of “Did the tribunal break the rules of procedural fairness when the decided issues were not raised by both parties?” was argued by APEGA to be false, as they did not give Mr. Mihaly the examinations to be unfair, but as stated in their guidelines, “confirmatory examinations **or** examinations for the purpose of correcting a perceived academic deficiency” (Ross, 2016, pg.9). Further, they argue that the Tribunal broke the rules of procedural fairness when the Tribunals decision was also based on the grounds that the parties did not advance, and therefore had not been given the chance to address the issues. This was concluded that there was not a breach in procedural fairness by the Tribunal. (Ross, 2016, pg.10)

The second issue raised by the appeal was based on APEGA’s claim that the Tribunal did not have jurisdiction over Mr. Mihaly’s raised complaint because the Alberta Human Rights Act does not protect against discrimination based on where the person received their education, rather than place of origin. APEGA based their claim on a previous case of Grover vs. Alberta (Human Rights Human Rights Commission) (Ross, 2016, pg.10). In this case a woman argued that she was discriminated based on the place that she had received her education. The court ruled against her, saying that “place of origin” differs from place that one receives their education. The Tribunal argued against this case, bringing up the case of Bitonti vs British Colombia (Ministry of Health) where foreign medical students stated that the systems of training and licensing discriminated against foreign students (Ross, 2016, pg.11). The Tribunal concluded that the place or origin in this case was also to include the place of education. The Court reviewed both sides and concluded that the Bitonti case was closer in comparison to the Mihaly case, and therefore ruled that APEGA’s claim was not related.

The issue of *prima facie* discrimination falls under the AHRA, which says that no one shall discriminate against any persons in regard to any goods, services, accommodation or facilities that are usually available to the public (Ross, 2016, pg.12). The standard that was used by the Tribunal to test if this was violated is known as the Moore test. This establishes a connection between a characteristic that is protected from discrimination, that the individual experienced an adverse impact, and that the protected characteristic was a factor of the adverse impact (Ross, 2016, pg.12). The Tribunal argued that the place of origin was a factor in his application requirements, and it was discrimination as not all graduates from select programs and countries that have agreements with APEGA are exempt from the testing he was subjected to, and therefore the examinations were an unfair standard and a factor in the adverse impact. APEGA argued back, stating that if Mr. Mihaly had actually written the FE exam or the confirmatory exams they would be able to dictate if it was fair based on his score. However, as he did not write the tests, it is unknown if that is a fair statement. The Court discerned that the issue with the testing was not necessarily the discriminating problem, but rather the actual application itself is discriminating for those that are filtered down to apply. However, APEGA argues that those standards and policies are in place for safety and for the protection of the professional practice (“About APEGA”, n.d.). As their testing is knowledge based, and APEGA cannot interview each candidate on a case by case basis to see if they are qualified to be an engineer, it is a fair method of application. As the standard to become accredited by APEGA is high, it is logical that the application process for individuals coming from non-accredited institutes is held to the same standard.In a similar case (Jamorski v. Ontario), the Ontario Court of Appeal rejected a similar claim that the process distinguishing between accredited and non-accredited graduates was discriminatory (Ross, 2016, pg.16). They stated that it a matter of public safety, and it demands a level of regulation. It is unrealistic to assume and expect graduates from a different school to have the same standards of practice as one that has been carefully assessed and accredited. This issue now had changed into the matter of whether or not the testing had been discriminatory, compared to the standards that are in place for other graduates and for other accredited institutes. As the Moore test was not applied to these areas of investigation, the Court found that this lack of evidence rendered the Tribunals findings of *prima facie* discrimination unreasonable. (Ross, 2016, pg.19)

The final issue on the appeal was if the Tribunal’s decision that APEGA’s registration requirements were unjustified. The main issue with this appeal also relates to how APEGA supposedly did not reasonably accommodate Mr. Mihaly. The Tribunal argued that the confirmatory exams or the FE exams are too generic to subject him to, and that they should have assessed him and found what the exact academic deficiencies are, rather than an all-encompassing test or series of tests. They also requested that Mr. Mihaly be matched with a mentor to help him through the process of testing. However, as Mr. Mihaly’s program was on the FD list, he had his overall confirmatory examinations reduced from the normal 5, to 3. Furthermore, the assumption that APEGA could assess him differently, and how they should have more agreements with other institutions from which engineers come from to Canada is unreasonable, as it is unfair to assume that any institute has the resources or ability to expand their reach. This also extends to the comments about APEGA needing to find a mentor to help Mr. Mihaly with the tests. An institute should not have to use its resources to help individuals that are struggling with a fair assessment. The assignment of the exams was based purely on his academic record, and he was not treated any differently than any other similar candidate, and that consistency is backed up by fair policy (Ross, 2016, pg.22-26). In addition, the FE examination has a pass rate of 85%, and with a pass rate so high, it can be determined that it is not an unfair test. APEGA’s justification was found reasonable, and the Court sided with their defense. (Ross, 2016, pg.24)

The Court was given the options to either confirm, reverse or vary the order of the human rights tribunal, or send it back to the Tribunal with instructions. The Court of Queen’s Bench ruled that the Tribunal should be reversed. (Ross, 2016, pg.27)

# **Reflection and Opinion**

Mr. Mihaly filed a civil notice of appeal on the 22nd of January 2016 to the Court of Appeal of Alberta. However, Mr. Mihaly did nothing else with the appeal, until finally the appeal was struck off due to failure to file the appeal record on June 23rd, 2016. He then brought the application to restore the appeal to the Court of Appeal. There are many factors that go into restoring an appeal, some of which are: arguable merit; explanation of a defect; reasonable promptness in moving to cure a defect; time constraints and a lack of prejudice to the respondents (Slatter, J.A., 2017, pg.2). Mr. Mihaly also argued that the Court of Queen’s Bench would not accept all the files in support of his application. However, it was not an error on behalf of the Queen’s Bench, but on Mihaly as the documents were handed in late. Mr. Mihaly has no defense on any of the other points that would restore his application. The Alberta Court of Appeal dismissed this application on January 10, 2017. (Slatter, 2017, pg.4)

After reading through many different documents, citations and appeals, I found that the Tribunals decisions and statements seemed to be lacking in many different aspects, foremost being evidence. Mr. Mihaly’s initial application to APEGA was treated in my opinion as fair. He did not have the correct credentials to become a professional engineer, and he was unable to pass, or even attempt all of the tests. If he is unable to pass the standardized tests set by APEGA, an institute that has always been held in high regard, then he simply does not deserve to become a professional engineer. At the end of the day, engineering is a field which is directly linked to public safety. And if an individual is unable to show that they are competent in testing that is globally accepted, then they should be denied. With the sheer volume of applicants trying to receive the same credit from their various education and work backgrounds, it is hard to imagine a system that would be able to perform in the way that the Tribunal had asked APEGA to do for Mr. Mihaly in regard to the mentoring and test taking. APEGA’s standards dictate that the applicant must: be a Canadian citizen or permanent resident; have a good reputation; be able to prove the knowledge of the Engineering and Geoscience Professions Act (EGPA); have a good understanding and proficiency in the English language; and have acquired the correct academic and work experience for the application (Ross, 2016, pg.5). The academic requirements are governed by the Canadian Engineering Accreditation Board (CEAB) who’s main purpose is to assess engineering programs within and outside of Canada. Their standards show that the accreditation process is quite lengthy and elaborate, as to ensure that the standard is being upheld for engineering. Those programs that aren’t recognized by the CEAB may be included on a different list known as the Mutual Recognition Agreements (MRA’s), by which Canada can enter an agreement with other countries based on the merit of their accredited programs. Furthermore, if it isn’t shown on the list of MRA’s, there is another list known as the Foreign Degree list (FD List) which shows a list of several thousand institutes. If the institute that you received your education is on that list, you are exempt from 2 of the 5 confirmatory examinations, as was the case with Mr. Milahy. With that in mind, APEGA receives about 1500 applicants every year. They are filtered through this process to see where their credentials will be accredited. Out of the 1500 applicants, 60% of them are registered without any exams due to their academic record. 25% of applicants are asked to write the FE exam or confirmatory examinations, and the remaining applicants have the work experience to have the exams waived. As the FE exam has a pass rate of 70-80%, it is hard to see how someone could claim discrimination when the framework for the policies is justified and takes all cases into consideration, without being unbearably challenging (Ross, 2016, pg.5-7). Because of these reasons, I think that the standards that are in place right now are satisfactory for dealing with foreign applicants.

I do agree with the Court of Queen’s Bench decision. Due to the thoroughness of APEGA’s application policy’s, I found it disappointing that this case had to be addressed by the Court of Queen’s Bench just to reverse poorly considered decision by the Tribunal. The time and attention to the details that they took with this case shows, as the Tribunals decision was loaded with logical errors and facts. I also believe that the Alberta Court of Appeal made the right decision to not restore Mihaly’s appeal. Just taking into consideration that he was unable to even fill out the application on time shows how much Mr. Mihaly really believed that he was deserving of an appeal. The Alberta Human Rights Commission seemed to have made a rash decision, and because of that it stemmed a much larger issue that could have been avoided with proper care. They seemed to glaze over APEGA’s standards without relating their high bar to a standard of safety, rather than an inconvenience for international graduates.

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