

Mr. Mihaly v. APEGA CASE Study

By: Krista Lane Dazo and Junghoon Oh



February 16, 2018

For: Dr. Denis Onen

University of Calgary

ENGG 513 – Winter 2018

Contents

[**Introduction** 2](#_Toc506599063)

[**Stakeholders** 2](#_Toc506599064)

[Association of Professional Engineers and Geoscientists of Alberta [APEGA] 2](#_Toc506599065)

[APEGA Board of Examiners 2](#_Toc506599066)

[Alberta Human Rights Commission [AHRC] 3](#_Toc506599067)

[Court of Queen’s Bench [CQB] of Alberta 3](#_Toc506599068)

[Court of Appeal of Alberta 3](#_Toc506599069)

[Engineers Canada 3](#_Toc506599070)

[National Council of Examiners for Engineering and Surveying [NCEES] 3](#_Toc506599071)

[Ladislav Mihaly 3](#_Toc506599072)

[Public 4](#_Toc506599073)

[**Background** 4](#_Toc506599074)

[**Court of Queen’s Bench Decision** 5](#_Toc506599075)

[**Reflection and Opinion** 7](#_Toc506599076)

[**References** 9](#_Toc506599077)

# **Introduction**

This report will delve into one of the most controversial regulatory cases of 2016 in Canada as it greatly pertains to public protection. The case proceedings of the Mr. Mihaly v. Association of Professional Engineers and Geoscientists of Alberta [APEGA] will be examined. The profession of engineering in Canada is a self-regulated profession. In Alberta, APEGA is the governing body for the engineering and geocscience standards and practices. Mr. Mihaly is an internationally trained engineer who filed a complaint with the Alberta Human Rights Commission [AHRC] on the basis of discrimination based on place of origin, contributing to being unreasonably disadvantaged in his application for a license to practice.

This report will discuss: the stakeholders that would ultimately be affected and influenced by the court rulings; the background of the case including the Tribunal decision; and a detailed transcript of the Court of Queen’s Bench [CQB] of Alberta’s decision with regards to APEGA’s appeal. The report will be concluded with a reflection on the decisions made by the AHRC Tribunal, the CQB, and the Court of Appeal of Alberta, along with opinions on granting accommodation to foreign-trained engineers and geoscientists.

# **Stakeholders**

## Association of Professional Engineers and Geoscientists of Alberta [APEGA]

APEGA is a regulating body that upholds and oversees Alberta’s engineering and geoscience standards and practices on behalf of the Government of Alberta through the Engineering and Geoscience Professions [EGP] Act [1]. The EGP Act serves to protect public health, welfare, and environment, and holds safety as paramount. The association is responsible for licensing individuals with the desire to practice engineering and geoscience in Alberta and ensuring that every qualifying member practices within APEGA’s standard of ethical, professional, and technical competency. APEGA’s secondary responsibilities include taking action against individuals that practice without a license or permits and support members in their professional practices [2].

## APEGA Board of Examiners

Comprised of 60 to 70 members, including a handful of public members appointed by the Minister of Labour, the Board of Examiners establishes admission standards and qualifications for the engineering and geoscience professions. Their duties include: developing standards, policies, and procedures that coincide with the Engineering and Geoscience Professions Act; reviewing applications for APEGA memberships and determining if the application meets the requirements of the Act; and developing and maintaining the exam syllabi [3].

## Alberta Human Rights Commission [AHRC]

The Alberta Human Rights Commission was established under the Alberta Human Rights [AHR] Act. The AHR Act protects Albertans from discrimination and ensures that all are given equal opportunity to work, live, and be part of a community. Moreover, they engage communities by public education and providing public information and consultation services. The commission settles and resolves discrimination complaints through human rights tribunal and court hearings [4].

## Court of Queen’s Bench [CQB] of Alberta

The Court of Queen’s Bench [CQB] is one of three courts in Alberta established by provincial legislation and administered by the Minister of Justice [5]. It is a superior court of civil and criminal jurisdiction constituted by the Court of Queen’s Bench Act. The CBC aims to preserve the Rule of Law which protects individuals’ rights and dignity and serve an unbiased forum for fair and apt resolution of legal disputes in Alberta [6].

## Court of Appeal of Alberta

The Court of Appeal of Alberta is the highest provincial appeal court [7]. It examines applications and appeals with regards to judgements, orders, and decisions of the other provincial courts and administrative and board tribunals. The Court of Appeal is not responsible for retrying cases. Instead, it determines the presence of errors in law or facts within the decisions passed by the other courts [8].

## Engineers Canada

Engineers Canada [EC] promotes and maintains the integrity, honour, and interests of the engineering profession nationally by unifying existing provincial and territorial regulatory associations [9]. It EC is involved in setting Canadian engineering professional standards with the appointed Qualifications Board Committee by accrediting undergraduate engineering programs and developing professional practice and qualifications guidelines to protect public welfare [10].

## National Council of Examiners for Engineering and Surveying [NCEES]

The National Council of Examiners for Engineering and Surveying in the United States [US] promotes uniformity in the US licensure process by developing, administering, and assessing engineering and surveying licensure examinations [11]. As an effort to uphold high competency standards, APEGA uses the Fundamentals of Engineering [FE] exam administered by the NCEES as one of the licensure exams to confirm engineering graduates’ technical aptitude [12].

## Ladislav Mihaly

Mr. Ladislav Mihaly was born and educated in the former Czechoslovakia. He holds a M. Sc. Diploma with a specialization in Technology of Fuels and Thermal Energy from the Slovak Technical University in Bratislava in 1975, and a Certificate in Corrosion Engineering from the Institute of Chemical Technology in Prague in 1981. After immigrating to Canada, in May 1999, he applied to APEGA for registration as a Professional Engineer. In 2008, Mr. Ladislav Mihaly had complained to the AHRC that APEGA discriminated against him based on place of origin with regards to his application to be registered as a professional engineer by refusing recognition of his education as an equivalent to an accredited Canadian engineering degree and being required to write confirmatory examinations [ [13]pp. 3].

## Public

The scope of APEGA’s duties include maintaining professional standards and policies to protect the welfare and safety of the public. If these stringent policies are infringed upon, public safety and interest would be drastically compromised.

# **Background**

In 1999, Mr. Mihaly applied to APEGA to be registered as a Professional Engineer. As ordered by APEGA, in January 2000, he failed his first attempt at the compulsory NPPE. After further reviewing his application and transcripts, APEGA required Mr. Mihaly to: pass the NPPE; complete three confirmatory examinations; and take a course or pass an equivalent Engineering Economics exam by May 2001. Although he applied to write the NPPE in October 2000, Mr. Mihaly failed to attend to write the exam [ [13]pp. 3].

In June 2001, APEGA withdrew his application as he failed to write the required examinations by May 2001. In May 2002, Mr. Mihaly asked APEGA to reactivate his application and applied to write the NPPE in July 2002, which he failed again. In June 2002, APEGA reactivated his file and restated that he is required to write three confirmatory examinations by May 2003 and the Engineering Economics course or exam by November 2003 [ [13]pp. 4].

Mr. Mihaly rewrote the NPPE in January 2003 and failed again. In August 2003, APEGA withdrew his application for a second time since he failed to write the confirmatory examinations. In October 2006, Mr. Mihaly asked APEGA to reactivate his application for a third time and APEGA requested an updated resume and list of references, which he provided a month later. In August 2007, the Board of Examiners reassessed Mr. Mihaly’s application and established that he had to complete three confirmatory examinations and a course or examination in Engineering Economics, or the Fundamentals of Engineering [FE] exam. Moreover, the Board determined that Mr. Mihaly still requires one year of acceptable D-level Canadian engineering experience as his past work experience was not eligible [ [13]pp. 4].

In August 2008, Mr. Mihaly filed a complaint with the AHRC with allegations of discrimination from APEGA for denial of registration as a professional engineer based on place of origin. In February 2014, the Tribunal determined that APEGA’s lack of individualized assessment or exploration of other assessment options under their Examination Standard and Experience Standard constitutes discrimination. The ruling led to the Tribunal awarding Mr. Mihaly $10,000 in damages and ordered APEGA to reconsider his application by appointing a committee to reassess and accommodate him by providing other options of support such as examination exemptions, matching Mr. Mihaly with a mentor, and networking aid. Furthermore, the Tribunal refused to award lost wages to Mr. Mihaly due to lack of evidence to his claim [ [13]pp. 4].

APEGA proceeded to file an appeal to the Court of Queen’s Bench [CQB] of Alberta against this Tribunal decision. In 2015, APEGA’s appeal was heard and cross-appealed by Mr. Mihaly increasing damages to millions. The Appellant, APEGA, presented the following issues: whether the Tribunal breached procedural fairness; whether the Tribunal determined discrimination based on place or origin or place of education; whether the Tribunal applied the appropriate legal test for determining prima facie discrimination; and whether the Tribunal was unreasonable in deciding that APEGA’s requirements were unjust [ [13]pp. 9].

In January 2016, the Court of Queen’s Bench ruled to reverse the Tribunal’s decision and determined that confirmatory exams are a fair and justifiable means in confirming technical competency. The CQB also dismissed Mr. Mihaly’s cross-appeal. In February 2016, Mr. Mihaly filed a Civil Notice of Appeal at the Court of Appeal of Alberta against the CQB decision. In June 2016, The Court of Appeal struck the appeal due to failure to advance the Appeal Record. In December 2016, Mr. Mihaly filed an application to restore the appeal. In January 2017, the Court of Appeal hearing was held. Since this case has been unresolved for eight years, APEGA is entitled to have finality to this proceeding as its methods in assessing foreign credentials is under scrutiny. Mr. Mihaly’s application to restore the appeal was denied as he failed to comply with the protocol for restoration of an appeal [ [14]pp. 1].

# **Court of Queen’s Bench Decision**

In the issue of procedural fairness, according to APEGA’s appeal, the Tribunal did not give the APEGA a chance to submit their interpretation of the Engineering and Geoscience Professions General Regulation [EGPR]: Section 8 (which they believed would have benefitted their case as it reinforced the conclusion that prima facie discrimination had not been justified). Moreover, the subject of the EGPR was not reiterated or raised during the hearing, even though it was one of the key factors that influenced the Tribunals decision. In the end, the CQB ruled that there was no breach in procedural fairness since the Tribunal is not required to give every party an opportunity to be heard on every point of law in deciding a case [ [13]pp. 10].

APEGA claimed that the Tribunal did not have jurisdiction over Mr. Mihaly’s complaint. Their argument is that the AHR Act protects against discrimination based upon place of origin, and this is not synonymous with place of origin of academic qualifications [ [13]pp. 10]. While APEGA cited the Grover v. AHRC case, the Tribunal argued using the Bitonti v. British Columbia (Ministry of Health) case which the court agreed followed the Mr. Mihaly case more closely in which licensing rules had discriminated against foreign-trained physicians based on their place of origin [ [13]pp. 11]. The court ruled that APEGA had not established that the Tribunal lacked jurisdiction since APEGA’s citation was unrelated [ [13]pp. 11].

APEGA appealed that the Tribunal did not use the appropriate test for determining prima facie discrimination as it was not comprehensive. The Moore test, the legal test selected by the Tribunal to establish a prima facie case of adverse effect discrimination, requires “complainants 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 [ [13]pp. 12]”. To establish prima facie discrimination, the Tribunal found Mr. Mihaly adversely impacted by APEGA’s requirements of writing confirmatory exams as these requirements do not apply to Canadian engineering graduates or countries with Mutual Recognition Agreements [MRAs]. They determined that Mr. Mihaly was treated as a foreign graduate due to the origin of his education, which is a “proxy for place of origin [ [13]pp. 14]”. In response, APEGA submitted that Mr. Mihaly is unable to establish an adverse impact since he never attempted the confirmatory exams. However, the Court believed it was reasonable for the Tribunal to conclude that having to write examinations is an adverse impact [ [13]pp. 14].

Upon inspection, the evidence cited by the Tribunal was clear that the distinction between accredited programs are not based on assumptions, but on verified knowledge [ [13]pp. 15]. The court concluded that the Tribunal’s findings were unreasonable as they made no reference to the evidence when they found that APEGA’s policies were based on discriminatory assumptions. [ [13]pp. 16]. Although the Moore test applied by the Tribunal to this case was relevant, it was not sufficient to establish discrimination. The test was never addressed in relation to the NPPE or the requirement of one year of Canadian experience. The evidence did not corroborate that nationality was a factor in any disadvantage to Mr. Mihaly especially since the NPPE is mandatory for all applicants [ [13]pp. 18]. Consequently, the CQB ruled that the Tribunals apparent finding of prima facie discrimination in relation to the NPPE and Canadian experience requirement is unreasonable [ [13]pp. 19]. The Tribunal found that APEGA’s requirements were unjustifiable because in their opinion, Mr. Mihaly should only be required to write examinations to rectify academic deficiencies and that he should not be required to write a standardized test but be individually assessed instead. The Court determined that the Tribunal’s justification under AHR Act, Section 11 is only in relation to conduct which has been found to constitute prima facie discrimination. Therefore, the CQB decided that the Tribunal’s conclusion in which APEGA’s requirements were unjustified was also unreasonable and that drawing this conclusion is a display of overstepping their role [ [13]pp. 20].

The Tribunal also criticized the process by which the Foreign Degree List [FDL] was created. This became an irrelevant argument since Mr. Mihaly already benefitted from the FDL as he was only required to complete three instead of the conventional five confirmatory exams. Despite the assumption, APEGA also does not assign examinations to applicants solely based on perceived academic deficiencies. Rather, they assign exams to objectively and systematically assess the quality of the undergraduate engineering programs the applicants undertook. Insufficient knowledge of institutions or programs impedes APEGA from making rational conclusions with regards to level of competency. In response, the Tribunal directed that APEGA assume an active role in negotiating agreements overseas with foreign institutions, presuming that APEGA had the resources to accomplish this. APEGA’s policy of assessments for unconfirmed competence is consistent with the EGPR and follows its scope of upholding professional proficiency standards [ [13]pp. 22].

The Tribunal assumed that the FE exam would have a disproportionate effect on foreign educated applicants like Mr. Mihaly due to their background. However, this could not be proven since Mr. Mihaly never attempted these exams. Moreover, the court found APEGA’s requirements reasonable since statistically, the pass rate of the FE exam is 85 percent and the exam can be rewritten [12]. APEGA individually assesses applicants’ eligibility for waived exams. It was just unfortunate that Mr. Mihaly was ineligible for exemption. Mr. Mihaly did not pursue an internal appeal of that decision and failed to manifest evidence to the Tribunal that APEGA’s decision was erroneous [ [13]pp. 24]. The Tribunal failed to recognize Mr. Mihaly’s lack of due diligence in assisting APEGA in exploring other possible solutions as they suggested that Mr. Mihaly should be allowed to challenge the exams he was ineligible for exemption, whereas he never even attempted the FE exam or any of the confirmatory exams.

With the Tribunal’s ruling in February 2014, the Tribunal directed APEGA to designate a committee to assist Mr. Mihaly in assimilating into the Canadian engineering professional practice by providing a mentor for guidance in networking and language skills. The Tribunal maintained that this type of dedication of resources to the forecasted 375 applicants per annum is not a disproportionate resolution with the existing paying members [ [13]pp. 25]. With this, the CQB found that the Tribunal’s reasons for their demands were rampant with logical errors, unsubstantiated, and beyond the scope of any alleged or proven discriminatory conduct. In the final ruling of the case, the CQB upheld APEGA’s appeal and reversed the AHRC Tribunal’s decision. Mr. Mihaly’s cross appeal was dismissed as it only pertained to legal remedy which is dependent on the finding of unjustified prima facie discrimination under the AHR Act, Section 11 [ [13]pp. 26-27].

# **Reflection and Opinion**

Although the AHRC is valuable to the welfare of Albertans in other capacities, if the Tribunal’s decision remained, it would have impeded the capacity of professional regulators (including other self-regulated professions) to carry out their intended functions. Moreover, the Tribunal’s decision would ultimately lower the standards used to determine whether an individual has the appropriate education and experience to be licensed, increasing the unacceptable risk to public safety and well-being.

The Court of Appeal of Alberta’s decision to dismiss Mr. Mihaly’s application for appeal is fair as he failed to comply with the requisites for restoring an appeal. Everyone must have equal opportunity and follow the proper protocol to exercise their rights.

The CQB’s decision is important for regulators as well for it supports the necessity of standardized assessments and the non-obligatory need for regulators to alter their standards for foreign trained professionals on the basis of empirical evidence and not on discriminatory assumptions. APEGA regulates on behalf of EGP Act and Regulations and is obligated to protect the public. With their commitment to the betterment of society, they are doing their due diligence by screening all applicants striving for a license to practice (through establishing compulsory examinations and Canadian work experience).

In the issue of accommodations brought forth by the Tribunal’s decision, APEGA would have to act beyond their scope of duties and divert efforts and resources to cater to the reasonably sizeable foreign-trained demographic. Accommodations for foreign-trained applicants would only perpetuate the idea that they are not equals and that they need to be treated differently. All applicants should be treated equally, with the same support, and consequences, as well. Moreover, of the 1500 internationally educated APEGA applicants per annum, 60 percent are registered without issues, 25 percent are assigned confirmatory examinations or the FE exam (with an overall pass rate of 85%), and 15 percent are eligible for waived examinations due to sufficient engineering experience [ [13]pp. 24]. With this statistical data, it can be concluded that APEGA’s evaluations are practical and give equal opportunity for all. Given the success and reputation of APEGA and its members, it can be said that their current policies are fair and that their system works.

The CQB’s ruling to reverse the AHRC Tribunal’s decision was apt and does not provide professional regulators with protection in policies. Rather, it recognizes the interest of international applicants’ desire to legally practice and the regulator’s dedication to the safety and welfare of the public. The most disappointing and consequential lapse of judgement in this case was the Tribunal’s failure to foresee how their proceedings with this case would affect national standards, industry professional development, and fundamentally, the safety of Canadians.

# **References**

|  |  |
| --- | --- |
| [1] | APEGA, "Engineering and Geoscience Professions Act," [Online]. Available: https://www.apega.ca/about-apega/publications/engineering-and-geoscience-professions-act/. [Accessed 10 February 2018]. |
| [2] | APEGA, "About APEGA," [Online]. Available: https://www.apega.ca/about-apega/. [Accessed 10 February 2018]. |
| [3] | APEGA, "Board of Examiners," [Online]. Available: https://www.apega.ca/about-apega/boards-and-committees/boe/. [Accessed 10 February 2018]. |
| [4] | Alberta Human Rights Commission, "About the Commission," [Online]. Available: https://www.albertahumanrights.ab.ca/about/Pages/about.aspx. [Accessed 10 February 2018]. |
| [5] | Alberta: Justice and Solicitor General, "Chart of courts in Alberta," [Online]. Available: https://justice.alberta.ca/programs\_services/courts/Pages/chart\_courts\_alberta.aspx. [Accessed 10 February 2018]. |
| [6] | Court of Queen's Bench of Alberta, "Jurisdiction and Governance," [Online]. Available: https://albertacourts.ca/qb/about/jurisdiction-and-governance . [Accessed 10 Ferbruary 2018]. |
| [7] | Court of Appeal of Alberta, "Court of Appeal of Alberta," [Online]. Available: https://justice.alberta.ca/programs\_services/courts/Pages/appeal\_courts.aspx . [Accessed 10 February 2018]. |
| [8] | Court Appeal of Alberta, "Role and Operation of the Court Appeal of Alberta," [Online]. Available: https://albertacourts.ca/ca/about/role-and-operation. [Accessed 10 February 2018]. |
| [9] | Engineers Canada, "About Engineers Canada," [Online]. Available: https://engineerscanada.ca/about/about-engineers-canada . [Accessed 10 February 2018]. |
| [10] | Engineers Canada, "Qualifications Board," [Online]. Available: https://engineerscanada.ca/about/committees/board/qualifications-board . [Accessed 10 February 2018]. |
| [11] | National Council of Examiners for Engineering and Surveying , "About: National Council of Examiners for Engineering and Surveying (NCEES)," [Online]. Available: https://ncees.org/about/ . [Accessed 10 February 2018]. |
| [12] | APEGA, "Fundamentals of Engineering Exam," [Online]. Available: https://www.apega.ca/apply/exams/fundamentals-engineering-exam-fe/ . [Accessed 10 February 2018]. |
| [13] | Court of Queen's Bench of Alberta, "APEGA v. Mihaly, 2016," Judicial Centre of Edmonton, Edmonton, 2016. |
| [14] | Court Appeal of Alberta, "Mihaly v. APEGA," Court of Alberta, Edmonton, 2017. |