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Case Study Report:

APEGA v Mihaly, 2016

ABQB 61

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***Introduction:***

This report is a focussed in-depth study of the Association of Professional Engineers and Geoscientists of Alberta v. Mihaly, 2016 ABQB 61 case which also further stems from the Mihaly v. The Association of Professional Engineers, Geologists and Geophysiscists of Alberta, 2014 AHRC 1 case. This involves the complaint filed by Mr. Ladislav Mihaly with the Alberta Human Rights Comission which states he was discriminated by APEGA based on place of origin in his failed attempted registration as a professional engineer in 1999. The tribunal decision to his complaint was later reversed by the court and appealed by Mihaly. This report will indicate the importance of writing examinations held to maintain entry level engineering competence in Canada if an individual has been foreignly trained as an engineer or geoscientist. A background analysis and opinionated reflection of this case will conversate and detail the vital importance of having associations such as APEGA which the bylaws and regulations are reasonably necessary in ensuring safe practice as a professional.

***Stakeholders:***

A  stakeholder  is  defined  as  “a  person  or  group  of  people  who  can  affect  or  be  affected  by  a

given  project”  The  stakeholders  relevant to this case are as follows:

* The Association of Professional Engineers and Geoscientists of Alberta (APEGA): The association was the respondent of Mr. Mihaly’s complaint in 2008. APEGA refused to grant Mihaly a professional engineering license due to him not completing the confirmatory exams after reactivation of his application three times. There were three witnesses for APEGA, of which included Dr. Gary Faulkner. [2]
* The Court of Queen’s Bench: The Tribunal Decision for the case in 2014 was under appeal and cross-appeal by APEGA and Mr. Mihaly, which was to be held by the Court of Queen’s Bench in the form of a hearing. [1]
* The Alberta Human Rights Commission: Mr. Mihaly complains to the Human Rights Tribunal on APEGA discriminating against him based on place of origin. The tribunal reviews the complaint based on its merit and evidence and comes to a decision. The Alberta Human Rights Commission was also a respondent in the cross-appeal to the Court in 2016.
* Mr. Ladislav Mihaly: The individual who filed the complaint against APEGA to the Alberta Human Rights Commission after allegedly being discriminated based on place of origin.
* Law Society of Alberta: Under the 2016 case regarding the appeal and cross-appeal, the Law Society of Alberta served as an intervener. [1]
* The Canadian Engineering Accreditation Board (CEAB): The CEAB were involved to ensure that the degrees Mr. Mihaly obtained from Czechoslovakia agreed with the accreditation processes for engineering programs in Canada. Other countries with substantially equivalent accreditation processes as Canada are allowed to enter into Mutual Recognition Agreements (MRA’s). The CEAB determines whether the accreditation process is equivalent. The graduates of these accredited programs, which are covered by MRA’s, are generally not assigned examinations by APEGA. Slovakia has not applied to undergo this process resulting in no MRA between Slovakia and Canada. [1]
* The National Council of Engineering Examiners and Surveyors: The FE exam is a compulsory exam taken by all United States’ graduates who wish to be licensed as professional engineers in the United States. APEGA currently prefers to have the FE exam replace the other confirmatory exams that Mihaly had to complete in order for licensing. [1]
* Alberta Court of Appeal: After the Tribunal Decision was reversed, Mihaly then appealed to the Alberta Court of Appeal.

***Background (Case Summary):***

This case can be summarized by analysis of the process and history while dictating the decisions of three bodies, which include, the Alberta Human Rights Commission, the Court of Queen’s Bench, and the Alberta Court of Appeal.

In May of 1999, Mr. Ladislav Mihaly, who was born in Czechoslovakia, applied to APEGA for registration as a professional engineer. Having obtained two Masters degrees from the Slovak University of Technology in Bratislava and the Institute of Chemical Technology (ICT) in Prague, Mihaly described these qualifications while, in addition, also provided three references for contact and inquiries in his application [2]. APEGA then acknowledged his application on May 13, 1999, and requested formalities from Mr. Mihaly including for him to be required to write the National Professional Practice Exam (NPPE). On February 11, 2000, APEGA advised Mr. Mihaly that he was to also complete three confirmatory examinations as well as take a course or pass an equivalent exam in Engineering Economics by the date of May 2001 [1]. In addition to this news, he was also advised that he had failed the NPPE, which he had written on January 17, 2000. Later in August, Mr. Mihaly opted to write the NPPE for a second attempt but failed to attend on the set day of the examination. His application was then withdrawn since the required confirmatory exams were not completed by May 2001. [2]

On May 31, 2002, Mr. Mihaly asked APEGA to reopen his application for registration and also reapplied to write the NPPE on July 15, 2002. APEGA then did reactivate Mr. Mihaly’s application and advised him to have completed and passed the confirmatory exams by May of 2003. Also, APEGA advised Mr. Mihaly that he needed to pass the Engineering Economics exam by November of that same year [1]. After back and forth emails with APEGA regarding his qualifications and how they compared with Canadian qualifications, Mr. Tokarik of APEGA had a phone call with Mr. Mihaly explaining how his qualifications and experience did not meet APEGA’s academic requirements. Mr. Tokarik also mentioned it to Mr. Mihaly that his degrees were “listed on the Canadian Council of Professional Engineers Foreign Degree List and that his confirmatory examinations assessment is the standard assessment in such cases” [2]. Mr. Mihaly failed the NPPE on his second attempt and his application for registration was removed by APEGA once again because he had not written the confirmatory examinations during the set period specified.

On October 3, 2006, Mr. Mihaly asks APEGA to reopen his application for a third time. He updated his reference information needed to complete the application. The Board of Examiners reconsidered Mr. Mihaly’s application and determined that he needed to complete and pass the three confirmatory examinations plus the Engineering Economics exam [2]. In addition to this, it was required of Mihaly to obtain a year of acceptable D level North American engineering experience [1]. Mr. Mihaly did not write the required confirmatory examinations, and on August 5, 2008, he filed a complaint with the Alberta Human Rights Commission alleging that APEGA discriminated against him based on his place of origin when the association denied him registry as a professional engineer.

The Human Rights Tribunal found that “Mr. Mihaly has succeeded in establishing that the *Examination* and the *Experience Standard* used by [APEGA] to assess his educational credentials, without more individualized assessment or exploration of other options, constitutes discrimination which cannot be justified under the [AHRA]”. Mr. Mihaly was awarded $10,000 and the Tribunal further ordered APEGA to reconsider Mihaly’s application for registration as a professional engineer [1]. APEGA appealed the Tribunal Decision, and Mr. Mihaly cross-appealed to the Alberta Court of Queen’s Bench.

In January of 2016, Madam Justice Ross, a judge from the Alberta Court of Queen’s Bench, reversed the Tribunal Decision, stating that the ruling was based on errors and was unreasonable [4]. Mr. Mihaly filed an appeal, but the Alberta Court of Appeal decided to drop it since he failed to follow up with them. Justice Frans Slatter of the Appeal Court dismissed Mr. Mihaly’s application made in December of 2016 to restore his appeal. As nothing was concluded since then, Carol Moen of the engineers association says the “regulator considers the case to be closed” [4].

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

APEGA filed its appeal to the Tribunal Decision on November 20, 2014, and Mr. Mihaly directly filed a response statement the same day. Briefs on the Cross-Appellant (Mihaly) and the Cross-Respondent (APEGA) were filed in, as well as, a brief from the Law Society of Alberta was filed issuing themselves as Intervener on November 21, 2014. The appeal hearing was initially set for December 12, 2014 but did not proceed as the Court of Queen’s Bench allowed for further submissions based on legal issues raised by the Appellant in regards to the Respondent. It was recognized by the Court that there were circumstances in which the Tribunal may have made broader submissions as to their appeal or judicial review [6]. The Tribunal was made to address the following legal issues relevant to our discussion:

1. the test for *prima facie* discrimination
2. the test for the defense of a *bona fide* occupational requirement

The appeal hearing proceeded on the 23rd and 24th of July, 2015 [1].

The Issues raised by APEGA in the appeal are as mentioned:

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 correct legal test, and reasonably apply that 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? [1]

As for procedural fairness, Madame Justice Ross of the Court concluded that the Alberta Human Rights Tribunal had not breached the rules when it did not ask for submissions and interpretations. She also concluded that the jurisdiction issue was more properly determined and resolved by the legal test for *prima facie* discrimination. The majority of Justice Ross’s final decision addressed if the Tribunal had used and applied the correct test for *prima facie* discrimination, and whether it was justifiable for the Tribunal Decision to conclude that the APEGA registration requirements were unreasonable [6].

The Tribunal relied on the *Moore* test set out by the Supreme Court of Canada to establish *prima facie* discrimination. The test summarized by Justice Ross is as follows:

Under the **Moore**test, establishing 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… [3]

The Tribunal had found that the confirmatory examinations Mr. Mihaly had to complete was an example of *prima facie* discrimination based on two points:

* 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;
* that Mr. Mihaly should not have been required to write a standardized “one size fits all” examination, rather than being individually assessed. [6]

Justice Ross substantiated that the first point was a misinterpretation by the Tribunal of section 8 from the *Engineering and Geoscience Professions General Regulation* [3]*.* She noted that because there are numerous engineering programs that can be assessed, APEGA cannot negotiate agreements with all of them, and therefore must assign examinations assessing the quality and integrity of the engineering programs undertaken by applicants abroad. In respect to the second point, Justice Ross concluded that there was no extra evidence where internationally educated graduates with entry-level competence would have any difficulty passing the FE exam [6].

Ultimately, Justice Ross concluded that the Tribunal Decision failed to consider extremely relevant factors when assessing Mr. Mihaly’s situation with his attempted registration as a professional engineer based on his qualifications and that APEGA had met its requirements when establishing that any *prima facie* discrimination was reasonable and justifiable if applicable. In conclusion, the Court of Queen’s Bench, represented by Justice Ross, reversed the Tribunal Decision and did not remit the matter back to the Tribunal [5].

***Reflection and Opinion:***

As the Tribunal Decision was reversed by the Court of Queen’s Bench based on errors and unreasonable justification due to lack of evidence, Mr. Mihaly filed an appeal to the Alberta Court of Appeal which was dropped due to his unresponsiveness to follow up. Justice Frans Slatter of the Appeal Court later dismissed Mihaly’s application on restoration of the appeal and the case is arbitrarily closed [4].

As The Alberta Human Rights Commission received Mr. Mihaly’s complaint statement, it was evident that their intention was to recognize any discriminatory evidence placed against Mr. Mihaly by APEGA and their board of examiners through not acknowledging his given qualifications and said experience that he obtained from Czechoslovakia. This intention was noble, but because of incorrectly interpreting the *prima facie* test and basing the discrimination on assumption rather than actual knowledge of the program, I believe that the Tribunal Decision finding Mr. Mihaly successful in establishing that he was indeed discriminated against by APEGA based on place of origin as invalid. Mr. Mihaly and the Alberta Human Rights Commission failed to establish sufficient evidence for discrimination because the confirmatory exams he was issued with completing are required by all applicants of registry wherever they may be educated and were not only penalized to him. There also was no evidence where Mr. Mihaly’s failure of the exams was due to his place of origin. Finally, Mr. Mihaly’s difficulty with finding a job for himself was because firms usually expect to hire engineers who have completed at least 6 years of experience in a junior position and not because of his place of origin. These three reasons disagree with the Tribunal Decision by the commission.

The decision made by the Court of Queen’s Bench to reverse the Tribunal Decision is justifiable because it assures that APEGA’s *Examination* and *Experience Standard* does not constitute discrimination but instead holds international standards for engineering and geoscientist programs in equality to the standards set for programs in Canada. This ensures the competency of professional engineers from any part of the world. The Court also didn’t find evidence from the Tribunal proving that internationally educated graduates with entry-level competence would have any difficulty in passing the FE and other confirmatory examinations. Testing entry-level applicants in competence is absolutely necessary to ensure safe practice as a professional. This is not discrimination based on place of origin but rather a reasonable necessity to keep qualifications from foreign countries at par with Canadian accreditation standards.

In regards to the Alberta Court of Appeal dismissing Mr. Mihaly’s application to reopen his appeal against the Court of Queen’s Bench’s decision, Justice Frans Slatter of the Appeal Court states that “even Canadian institutions must demonstrate the equivalency of their programs, and Canadians who receive foreign training must also demonstrate equivalency” [4]. This statement negates Mr. Mihaly’s complaint on discrimination because Mr. Mihaly’s failure to complete the confirmatory exams was due to lack of competence and not due to his place of origin. For this reason, it is agreeable for the Alberta Court of Appeal to accept the Court of Queen’s Bench’s decision.

These following quotes regarding the Mihaly case made by members of APEGA summarize why I agree with the reversal of the Tribunal Decision made by the Court of Queen’s Bench:

* “While we respect the important role of the Alberta Human Rights Commission, the tribunal’s decision with regard to Mr. Mihaly, were it to stand, would have had significant negative impacts on the ability of regulators – and not just in engineering but in geoscience, medicine, law, dentistry, and accounting to name but a few – and would have resulted in an unacceptable increase in risk to public safety and well-being.”

- APEGA CEO Mark Flint, P. Eng. [5]

* “I believe the decision confirms the fact that APEGA’s application process is fair, equitable, and transparent and that the same rigorous standards should apply to all applicants for licensure as professional engineers.”

- APEGA Registrar Carol Moen, P. Eng. [5]

I believe that APEGA should accommodate foreign-trained engineers, but not at the expense of competence and professional integrity. The confirmatory and FE exams are a crucial part of ensuring public safety and the growth of industry by weeding out applicants who are not up to standard with their qualifications and experience. APEGA can take the initiative to better explain the standards and requirements to foreign institutes through an online website or notification before an applicant is willing to register in Alberta. This can remove confusion and further issues if the applicant knows what they are dealing with as they continue registration. If an applicant does not have the necessary requirements fulfilled or their qualifications are sub-par, than APEGA could guide and counsel them to institutions where taking the necessary courses can help them better achieve their future goal of becoming a professional.

In conclusion, this case study helps demonstrate that by practicing in a field in which you are incompetent, you not only risk your professional livelihood, but also the safety of the public and the dignity and honor of the profession as a whole. The case study also helps to show the crucial importance of Associations like APEGA, which are needed in order to mitigate situations like this, and to not allow them to progress further into a much more severe safety concern.

***References:***

[1] Ross, J. M., Justice. (2016). Court of Queen's Bench of Alberta. *Citation: Association of Professional Engineers and Geoscientists of Alberta v Mihaly , 2016 ABQB 61,*1-27. Retrieved February 12, 2018, from <https://www.apega.ca/assets/PDFs/mihaly-decision.pdf>.

[2] Jiwaji, M., MBA. (2014, February 6). HUMAN RIGHTS TRIBUNAL OF ALBERTA. Retrieved February 12, 2018, from https://www.canlii.org/en/ab/abhrc/doc/2014/2014ahrc1/2014ahrc1.html?search

[3] G. Andrews, Canadian Professional Engineering and Geoscience: Practice and Ethics, 5th ed. Toronto: Nelson, 2014.

[4] Clotter, J. (2017, January 12). Alberta Court of Appeal won't restore foreign-trained engineer's appeal. Retrieved February 12, 2018, from <http://www.cbc.ca/news/canada/calgary/ladislav-mihaly-engineers-alberta-foreign-1.3933845>

[5] APEGA’s Successful Appeal of Alberta Human Rights Commission Tribunal Decision Protects Public. (2016). 1-1. Retrieved February 13, 2018, from <https://www.apega.ca/assets/news-releases/ahrc-appeal-decision.pdf>.

[6] Mckay-Panos, L. (2016, March 23). Alberta Court of Queen’s Bench Overturns Discrimination Decision on Foreign Trained Engineer. Retrieved February 14, 2018, from <https://ablawg.ca/2016/03/23/alberta-court-of-queens-bench-overturns-discrimination-decision-on-foreign-trained-engineer/>