Mihaly vs APEGA Report

ENGG 513

Xun Sun

February 10th, 2018

Instructor Name: Denis Onen

# Introduction:

The following report details the case of Ladislave Mihaly v APEGA. Firstly, all stakeholders related to the case are identified and introduced. Secondly, the report summarizes the background of the case, and the actions taken by each party leading up to the case being reviewed by The Court of Queen’s Bench and the Alberta Court of Appeal. Thirdly, a decision made by The Court of Queens is explained with further details. Finally, the report will end with a personal reflection of the case.

Stakeholders:

The following stakeholders are identified, and their significance to the case are detailed:

1. APEGA: The Association of Professional Engineers and Geoscientists of Alberta. APEGA is appealing the decision reached by the Alberta Human Rights Tribunal that they have discriminated against Ladislav Mihaly in his application to be registered as a profession engineer, on the grounds of his place of origin. APEGA has set standards for foreign applicants in its legislative framework, which may require for the applicant to complete the National Professional Practice Exam (NPPE), along with additional confirmatory examinations or the Fundamentals of Engineering (FE) exam, and other requirements. The aforementioned requirements may be waived if the applicant is a graduate of a Canadian Engineering Accreditation Board Substantially Equivalent Program. APEGA receives about 1500 internationally educated applicants each year, with 60 percent deemed qualified to forego the confirmatory or FE Exam, 25 percent assigned the confirmatory or FE Exam, and 15 percent to have the exams waived. The exams can also be waived in the applicant has an acceptable Masters or Ph.D., or more than ten years of acceptable work experience.
2. The Court of Queen’s Bench of Alberta: The superior court of criminal and civil jurisdiction in Alberta[1], generally only trying the most serious criminal offences such as murder and drug trafficking, as well as civil proceeding as well as appeals to civil cases under $50000. The Court of Queen’s Bench is constituted by the Court of Queen’s Bench Act, providing a Chief Justice and 2 Associate Chief Justices, as well as 65 other justices. The justices of the Queen’s Bench are appointed by the federal government. [2] In the case of Mihaly vs APEGA, the justice overseeing the case is Honourable Madam Justice J.M. Ross.
3. The Alberta Human Rights Commission (AHRC): Established under the Alberta Human Rights Act (AHRA). The Commission carries out functions under the act, the ensure that all Albertans have an equal opportunity to earn a living, find shelter, and have access to publically available to services without discrimination. The Chief of the Commission and Tribunals (CC&T) appoints human rights tribunals responsible for resolving discrimination found in the workplace. [3]
4. Mr. Ladislav Mihaly: Mr. Mihaly is an immigrant born in the former Czechoslovakia. He has a Master’s Diploma with a specialization in Technology of Fuels and Thermal Energy from the Slovak Technical University in Bratislava, as well as a Certificate in Corrosion Engineering from the Institute of Chemical Technology in Prague. He immigrated to Canada in 1999, and applied to then APEGGA to become a professional engineer, but was unsuccessful doing so due to not being able to pass the NPPE after several attempts, as well as missing the deadline to complete the required confirmatory exam in his first and subsequent applications. In 2008, Mr. Mihaly filed a complaint to the Alberta Human Rights Commission, alleging APEGA to have discriminated against him based on his place of origin, after denying him of several attempts to register as a professional engineer.
5. The Province of Alberta: The Province of Alberta can be impacted by the potential outcomes of the case. APEGA’s registration process is heavily influenced by practices, ethics, safety guidelines and laws of Alberta. Any current legislations of APEGA found to be discriminating against potential applicants should be rectified so that every applicant has an equal opportunity to become a professional engineer or geoscientist. On the other hand, the qualifications of Mr. Mihaly must be carefully assessed so that if he is to become accredited as a professional engineer, he has sufficient knowledge of local practices so that any professional work done by him does not put the public’s wellness in question.
6. The Government of Canada: The federal government has an interest in the case due to public relations. The federal government needs skilled workers to come to Canada to promote economic and social development. If Mr. Mihaly is deemed to have been unfairly treated, it may discourage international engineers and other skilled workers to immigrate to Canada
7. Slovak Technical University in Bratislava: Mr. Mihaly obtained a Master’s degree from the university, but according to the FD list [4], the degree is assessed to be the equivalent of a Bachelor’s Degree. This can potentially take away the credibility of the university, and they will likely want their degree to be internationally recognized.

# Background:

The case begins when Mr. Mihaly first applies to APEGA (known then as APEGGA) to register as a professional Engineer in May 1999. APEGA acknowledged Mr. Mihaly’s application in the same month, and requested his transcripts, also advices him to write the NPPE. In January 2000, Mr. Mihaly attempts the NPPE for the first time, but later found out he failed the exam in February. At that time, APEGA also advised Mr. Mihaly to complete three confirmatory exams and a course in Engineering Economics by May 2001, in addition to passing the NPPE. Mr. Mihaly applies to write the NPPE for a second time in October 2000, but fails to attend the test. In June 2001, APEGA withdrew Mr. Mihaly’s application to register as a Profession Engineer, because he did not complete the confirmatory exams in the advised deadline of May, Mr. Mihaly then requested his application to be re-activated in May 2002. APEGA re-activates Mr. Mihaly’s application, and again requests him to complete the confirm three confirmatory exams and the course in Engineering Economics, this time setting the deadline to May 2003. In July 2002 and January 2003, Mr. Mihaly write the NPPE for the second and third time, but failed on both attempts, and APEGA again withdrew Mr. Mihaly’s application in August 2003, because Mr. Mihaly did not complete the confirmatory exams in the set deadline again. In October 2006, Mr. Mihaly requests APEGA to re-activate his application for the third time. In the same month, APEGA re-activates the application but requests an update resume and references due to the amount of time passed, which Mr. Mihaly obliged to. In August 2007, APEGA determined again that Mr. Mihaly must complete the three confirmatory exams and a course in Engineering Economics, or the FE Exam, as well as obtaining one year of acceptable D level Canadian engineering experience. In the same month, Mr. Mihaly filed a complaint with the Alberta Human Rights Commission, citing discrimination based on his place of origin. In February 2014, the Tribunal found Mr. Mihaly’s treatment constitutes discrimination based on APEGA’s Examination Standard and the Experience Standard. The Tribunal awarded Mr. Mihaly $10000 in general damages, and ordered APEGA to reconsider Mr. Mihaly’s application, this time including detailed provisions such as directing APEGA to provide options and support to correct Mr. Mihaly’s deficiencies, as well as providing him with mentorship and training resources in the engineering profession. However, they did not award Mr. Mihaly with lost wages due to uncertainties in establishing a connection between discrimination against Mr. Mihaly and loss of wage. Furthermore, Mr. Mihaly did not provide any evidence in his claim for lost wages. APEGA issued to appeal the decision of the Tribunal in February 2014 to the Court of Queen’s Bench of Alberta, and Mr. Mihaly cross-appealed the refusal to award him in damages for loss of income, seeking either $1000000 with registration with APEGA, or $200000 without. In January 2016, the Court of Queen’s Bench upheld APEGA’s appeal, and dismissed Mr. Mihaly’s cross-appeal. [5]

# The Court of Queen’s Bench Decision:

APEGA appealed the decision of the Tribunal based on four issues: Procedure fairness, Jurisdiction, Prima face discrimination, and Justification. While Mr. Mihaly’s cross-appeal relates only to remedy, and is based solely on prima face discrimination.

**Procedure fairness**: Firstly, APEGA contests that the Tribunal misinterpreted the legislation under question, the Engineering and Geoscience Professions General Regulation, Section 8(b), in that the Tribunal ignored the “or” in “an applicant may be assigned confirmatory examinations **or** examinations for the purpose of correcting a perceived academic proficiency. Also, APEGA alleged that the Tribunal breached the duty of fairness by not addressing APEGA first with the allegation, as well as not providing APEGA with an opportunity to address the issue. In support of their case, APEGA brought up the case of *Amacon Property Management Services Inc. v Dutt*, with the Justice Ross herself assessing the situation similar to *Pope & Talbot Ltd vs British Columbia*. Justice Ross concluded that the Appellant did not provide enough evidence to establish a breach of procedural fairness.

**Jurisdiction:** Secondly, APEGA submits that the Tribunal has no jurisdiction over Mr. Mihaly’s allegations, because the AHRA does not protect against discrimination based on “place of origin of academic qualifications”. APEGA brought up the case of *Grover v Alberta (Human Rights Commission)* to back up their claim. The Tribunal dismissed the jurisdiction claim, citing *Bitonti v British Columbia (Ministry of Health)*. The decision was made that the current case is closer related to the Tribunal’s case, and that APEGA did not establish the Tribunal lacking jurisdiction in this case.

**Prima facie discrimination:** In this section, the complainant must establish prima facie discrimination, falling under AHRA, s4. The implications are tested by the case of *Moore vs British Columbia (Education)*, which ruled that students with disabilities are entitled to receive accommodations required from the service of public education [6]. The complainant must show that they have a protected characteristic, and that they experienced an adverse impact due to discrimination against the protected characteristic. The Tribunal cited that the adverse impact stems from the requirement of Mr. Mihaly to write the confirmatory exams and the FE exam, when graduates of Canadians universities and universities from countries with MRAs are not required to write these exams. APEGA contests that the Tribunal’s allegation isbased on discriminatory assumptions rather that evidence, which the Justice agreed to, citing the case of *Fazli v National Dental Examining Board of Canada*. Additionally, the Justice ruled that there is no evidence of adverse impact discrimination with the NPPE due to the fact that all applicants are subjected to the NPPE. Mr. Mihaly also did not have the required work experience in Canada. Due to these findings, the Justice ruled the Tribunal failed to relate this case with the Moore test. With this decision, Mr. Mihaly’s cross-appeal was effectively dismissed.

**Justification:** Lastly, APEGA must establish “reasonable and justifiable” defense, and prove that they reasonably accommodated Mr. Mihaly throughout the registration process. The Tribunal alleged that APEGA should be more proactive in negotiating agreements with international institutions, but did not provide sufficient evidence that APEGA should be reasonably expected to do this based on resource and ability. The Tribunal also contested the problem of having a standardized exam without accounting the individual’s background and experience, which was also deemed flawed by the Justice. The Justice found that there is no evidence that graduates of competent education would have difficulty passing the FE Exam, which Mr. Mihaly did not attempt. Ultimately, the Justice concluded that the Tribunal’s requests are not justifiable, partly due to Mr. Mihaly not attempting the confirmatory exams or the FE Exam, or seek assistance and accommodations for him to pass the exams.

Based on these four sections, The Justice ruled that the decision of the Tribunal should be reversed, and that Mr. Mihaly’s cross-appeal is dismissed.

# Reflection and Opinion:

Personally, I partially agree with the AHRC’s decision to proceed with Mr. Mihaly’s complaint. In APEGA’s legislation, the requirements of waiving the confirmatory exams and the FE Exam are not defined clearly enough for it to be uncontested. Also, I believe that APEGA should be obligated to reach out to international institutions more, so that a more individual approach can be taken to ensure the applicant’s qualifications to waive the aforementioned exams. I fully agree with the Court’s decision to uphold APEGA’s appeal, as I believe their concerns are more related to Mr. Mihaly’s qualifications than where he obtained his education. This is evident in Mr. Mihaly’s repeated failed attempts at the NPPE, which can be interpreted that although he has work experience, he is not familiar with local practices, which would make it unsafe and unethical for him to practice in Alberta without further training.

In my opinion, APEGA should accommodate foreign-trained engineers and geoscientists to a reasonable level. Although Alberta may be in need of skilled professionals in the future as the economy becomes more prosperous, there should be enough motivation from the worker to educate him or herself of local knowledge in safety codes, ethics, laws, etc. One major accommodation that I would suggest is language, as it is difficult for the applicant to learn the language in their home country without practice.

# References

[1]"What is the difference between Provincial Court and Court of Queen's Bench? - Alberta Justice", *Justice.alberta.ca*, 2018. [Online]. Available: https://justice.alberta.ca/programs\_services/courts/Common%20Questions%20Library%20%20Courts/WhatIsTheDifferenceBetweenProvincialCourtAndCourtOfQueensBench.aspx/DispForm.aspx?ID=3. [Accessed: 15- Feb- 2018].

[2]"Jurisdiction & Governance", *Albertacourts.ca*, 2018. [Online]. Available: https://albertacourts.ca/qb/about/jurisdiction-and-governance. [Accessed: 15- Feb- 2018].

[3]"Tribunal", *Albertahumanrights.ab.ca*, 2018. [Online]. Available: https://www.albertahumanrights.ab.ca/tribunal\_process/Pages/tribunal\_process.aspx. [Accessed: 15- Feb- 2018].

[4]"Citation: Association of Professional Engineres and Geoscientists of Alberta v Mihaly, 2016 ABQB 61", *Apega.ca*, 2018. [Online]. Available: http://www.apega.ca/assets/PDFs/mihaly-decision.pdf. [Accessed: 15- Feb- 2018].

[5]"APEGA’s Appeal of Mihaly Decision Succeeds | APEGA", *Apega.ca*, 2018. [Online]. Available: https://www.apega.ca/news/appeal-mihaly-decision-succeeds/. [Accessed: 15- Feb- 2018].

[6]"The Moore Case: Summary of Key Points | Council of Canadians with Disabilities", *Ccdonline.ca*, 2018. [Online]. Available: http://www.ccdonline.ca/en/humanrights/litigation/Moore-Case-Key-Findings-9Nov2012. [Accessed: 15- Feb- 2018].

* or lost wages.