APEGA v. Mihaly Case Study

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Introduction

The following report analyzes the Court of Queen’s Bench’s decision in the case Mihaly v APEGA. The case revolves around APEGA’s application and accreditation process for immigrating engineers. Normally, applicants are assigned a number of confirmatory exams based on the person’s place of education. As well, a minimum of four years of relevant engineering experience, one of which must be in Canada, is required. These accreditation requirements were called into question by the Alberta Human Rights Commission (AHRC) upon review of a complaint filed by Mr. Mihaly. The AHRC found that APEGA’s application procedures were discriminatory and unfair to foreign applicants, and directed APEGA to make several changes to its application process for immigrating engineers. APEGA appealed the ruling to the Court of Queen’s Bench, and a hearing was held on July 24 and 25, 2015.

The purpose of this report is to outline the key stakeholders, the timeline of events leading up to the Court of Queen’s Bench’s hearing and decision, and the issues investigated in the appeal. As well, a personal reflection section is included and communicates our personal thoughts on Mihaly v APEGA and APEGA’s requirements in general.

Stakeholders

**Mr. Ladislav Mihaly**

Mr. Mihaly, born and educated in former Czechoslovakia, applied for Professional Engineer designation with APEGA in May 1999 [1]. On August 5, 2008, he filed a complaint with the AHRC claiming that APEGA discriminated against him based on his place of origin when denied registration [1].

**Association of Professional Engineers and Geoscientists of Alberta (APEGA)**

APEGA regulates the practice of professional engineering and geosciences in Alberta according to the Engineering and Geoscience Professions Act (EGPA) and the Engineering and Geoscience Professions General Regulation (EGPR) [1].

**The Alberta Human Rights Commission (AHRC)**

The Alberta Human Rights Commission handles complaints on matters related to the Alberta Human Rights Act (AHRA). In 2014, the AHRC concluded that APEGA's system for evaluating Mr. Mihaly's qualifications breached the AHRA and insufficient accommodations were made by APEGA to assist Mr. Mihaly [2].

**The Court of Queen's Bench**

The Court of Queen's Bench is the superior court for the province holding jury trials for civil and criminal matters. The Court of Queen's Bench overturned the 2014 Alberta Human Rights Tribunal decision.

**APEGA Board of Examiners (BOE)**

The Board of Examiners (BOE) assesses the qualifications of all applicants for registration and ensures that the individual meets the admission standards. The BOE examined Mr. Mihaly's application in February 2000 and advised him to complete required examinations to certify his qualifications [1].

**Canadian Engineering Accreditation Board (CEAB)**

The Canadian Engineering Accreditation Board accredits undergraduate engineering programs within Canada. As of 1997, the CEAB also examines international programs to determine if their program provides an equivalent educational experience as compared to Canada [2].

**Alberta Court of Appeal**

The Alberta Court of Appeal is the highest appeal court in the province of Alberta. On January 12th, 2017, The Court of Appeal dismissed Mr. Mihaly's application to restore his appeal to reconsider the 2016 Court of Queen's Bench decision [3].

**Dr. David Lynch**

Dr. David Lynch holds a position on both the BoE and CEAB. He appeared as a witness for APEGA providing a testimony on the registration and accreditation process [2].

**Dr. Gary Faulkner**

Dr. Gary Faulkner, part of the Board of Examiners, appeared as the second witness for APEGA to provide an overview of the admission process for the Engineering and Geoscience profession in Alberta. Dr. Faulkner reviewed Mr. Mihaly's application documents and confirmed his failure to complete the required examinations advised by the Board of Examiners [2].

**Mr. Mark Tokarik (Deputy Registrar of APEGA)**

Mr. Mark Tokarik, Deputy Registrar of APEGA, appeared as the last witness for APEGA to provide further evidence of Mr. Mihaly's application process [2].

Background

In May 1999, Mr. Mihaly applied for registration as a Professional Engineer with APEGA. APEGA instructed Mr. Mihaly to provide his transcripts and to complete the National Professional Practice Exam (NPPE). On January 17, 2000, Mr. Mihaly attempted the NPPE and failed. On February 11, 2000, the Board of Examiners reviewed the documents provided by Mr. Mihaly in support of his application. Mr. Mihaly was advised him to complete the following by May 2001: pass the NPPE, write three confirmatory examinations, and take a course or pass equivalent examination on Engineering Economics [1].

Between the years 2000 and 2003, Mr. Mihaly scheduled to write the NPPE exam three times. On October 16, 2000, he did not attend the examination causing APEGA to withdraw his application for failing to complete the required exams by the deadline. Mr. Mihaly asked to reactivate his application and APEGA advised him to complete the requirements by May 2003. Again, he wrote the NPPE, on July 15, 2002 and January 20, 2003, and failed both times. APEGA withdrew his application [1].

On October 3, 2006, Mr. Mihaly requested for his application be reactivated for the third time. APEGA requested an updated resume and list of resumes. APEGA further confirmed that he was required to pass the NPPE, complete three confirmatory examinations plus a course or examination in Engineering Economics or the FE, and obtain one year of Canadian professional engineering experience. Mr. Mihaly provided the updated information, but he did not write the required examinations [1].

On August 5, 2008, Mr. Mihaly filed a complaint with the Alberta Human Rights Commission under sections 4, 7, and 9 of the Alberta Human Rights Act alleging that APEGA denying him registration constituted discrimination based on place of origin. The hearing proceeded and the Human Rights Tribunal reached a decision on February 6, 2014. The Tribunal ruled that the Examination and Experience standards used by APEGA to evaluate Mr. Mihaly's qualifications, without further individual assessment, was discrimination and cannot be justified by the AHRA. General damages were awarded to Mr. Mihaly in the sum of $10,000. Awards for damages in lost wages were not awarded to Mr. Mihaly. To accommodate Mr. Mihaly, APEGA was ordered by the Tribunal to review his application, offer him the opportunity to challenge exams, establish a committee of international engineers to assist him, match him with a mentor, and direct him to networking and language resources [2].

APEGA appealed against the Tribunal decision on November 20, 2014. Mr. Mihaly also cross-appealed the Tribunal's decision seeking an award for lost wages in the amount of millions. The appeal hearing scheduled on December 12, 2014 was prematurely adjourned on account of the Court wishing to receive submissions from the Tribunal regarding the legal issues raised by APEGA. The hearing proceeded on July 23 and 24, 2015 [1].

During the hearing, APEGA's registration process was outlined by three witnesses on behalf of APEGA, namely, Dr. David Lynch, Dr. Gary Faulker, and Mr. Mark Tokarik. APEGA raised issues regarding the Tribunal's procedural fairness, jurisdiction, prima facie discrimination claim, and justification. On January 26, 2016, the Court of Queen's Bench overturned the Tribunal's decision. The Court concluded that the Tribunal's decision were "rife with logical errors, findings of fact that are not supported by the evidence, and failures to take into account relevant considerations [1]."

The Court of Queen's Bench decision was appealed to the Court of Appeal of Alberta on time by Mr. Mihaly on February 22, 2016. Nothing else was done by Mr. Mihaly perfect the appeal causing it to be struck on June 23, 2016 for failing to file the Appeal Record. On December 15, 2016, Mr. Mihaly again applied to restore the appeal. On January 10, 2017 the application was heard. Mr. Mihaly criticized the merits of the decision, but none of the pointed errors were clearly evident. He further complained that the Court of Queen's Bench did not accept information in support of his application. However, the Court of Queen's Bench was not obligated to accept the materials to reconsider the decision once the appeal had begun. Finally, his lack of punctuality in restoring the appeal was unacceptable. The respondent, APEGA, reserves the right to have finality in the case considering the complaint had been ongoing for eight years, since August 2008. On January 12, 2017, the Court of Appeal dismissed Mr. Mihaly's application as failing to meet the factors required in restoration of an appeal [3].

The Court of Queen's Bench Decision

The Court of Queen’s Bench, presided over by the Honourable Justice J.M. Ross, passed its decision on January 26, 2016. The appeal assessed the AHRC’s decision based upon the following issues: procedural fairness, appropriate jurisdiction, the presence of prima facie discrimination, and justification of decisions. The Court also ruled on the cross-appeal by Mr. Mihaly for the Tribunal’s decision not to award him damages. The appeal hearings proceeded on July 23 and 24, 2015 [1].

APEGA first raised the issue of procedural fairness. It argued that the AHRC Tribunal was unfair in its decision-making process. Originally, the Tribunal was charged with determining if APEGA’s certification requirements were justified under Section 11 of the Alberta Human Rights Act (AHRA). In this regard, the Tribunal determined that the confirmatory exams assigned to Mr. Mihaly did not serve the purpose of “correcting a perceived academic deficiency” as required in Section 8(b)(ii) of the Engineering and Geoscience Professions Act (EGPR) [1]. APEGA raised two concerns: that the Tribunal’s interpretation of the EGPR was incorrect, and that the Tribunal did not provide opportunity for either party to address the interpretation. The former is reviewed later, however the latter falls under the scrutiny of procedural fairness. APEGA alleged that because the Tribunal reached its interpretation of the EGPR without APEGA’s input, the Tribunal had caused a breach of procedural fairness. However, the Court ruled that courts and tribunals cannot be expected to give parties a chance to speak on every single point of law they refer to in their decision. The Court concluded that there was no issue of procedural fairness in this case [1].

APEGA’s second argument concerned the AHRC’s jurisdiction over Mihaly’s complaint. It argued that the Alberta Human Rights Act (AHRA) had no authority over APEGA’s requirements because it only protects against discrimination based on place of origin, not on place of origin of education. It relates to Grover v Alberta, in which the AHRC refused to hold a hearing in light of claims that certain Canadian universities preferred American PhDs over Canadian ones. It claimed that the AHRC’s refusal to review the complaint served as evidence that the AHRA does not view “place of origin” and “place of origin of education” as one and the same. However, the Court ruled that APEGA’s allegations would be determined by testing for prima facie discrimination. Thus, the Court ruled that there was no issue of jurisdiction [1].

The third argument disputed the existence of prima facie discrimination as identified by the Tribunal. APEGA again argued that the Tribunal’s finding of discrimination based upon place of origin was unfounded because place of origin is not the same as the place or origin of the person’s education. The Tribunal’s view differed – their decision stated that a person’s place of education is a proxy for their place of origin, and thus, issuing exams to immigrants from specific counties was evidence of prima facie discrimination. [1]

According to the Moore test, referencing to the case of Moore v British Columbia, three factors are needed to prove prima facie discrimination – complainants must show they have a trait protected from discrimination, proof that they have experienced an adverse effect, and proof that the protected trait was a factor in the adverse effect.[6]. The Court sided with the Tribunal that Mihaly had a trait which was discriminated against by APEGA, and that having to write the NPPE or FE, as well as confirmatory exams, could be considered an adverse effect. The Tribunal also went on to say that APEGA’s requirements perpetuate disadvantage for immigrating engineers [1].

This is where the Court and the Tribunal differ. The Court ruled that there was not enough evidence to establish prima facie discrimination. The Tribunal had failed to realize that writing the NPPE or FE exam is required by all applicants. Further, there was no evidence that Mihaly’s country of origin played any role in his difficulty passing the NPPE. The Tribunal had also declared that APEGA’s requirement of “one year [of] Canadian experience” was discriminatory as well – the court disagreed, stating that it was a requirement of all applicants as well. Additionally, the Moore test was not applied to any experience requirements, so prima facie discrimination could not be established [1].

Finally, the Court investigated whether the occurrence of any prima facie discrimination could be defined as reasonable and justifiable. The Tribunal had originally found that APEGA’s NPPE and experience requirements were unreasonable. This stems from the Tribunal’s interpretation of the EGPR that confirmatory examinations should be assigned only to correct perceived deficiencies in a person’s education. However, the interpretation of the EGPR was found to be unreasonable, as a second clause was completely excluded from the Tribunal’s interpretation, which read, “or where the Board of Examiners has required the applicant to complete one or more confirmatory examinations *or* examinations for the purpose of correcting a perceived academic deficiency.” There was no supporting evidence for this definition and no attempt was made by the Tribunal to improve their understanding of the EGPR. Thus, the Court ruled that the Tribunal had not established APEGA’s requirements as unjustifiable [1].

The Tribunal also critiqued many of APEGA’s accreditation and application practices. It was suggested that APEGA work proactively with other countries and institutions in the hopes of establishing program equivalency. However, the Court ruled it was beyond reasonable to expect APEGA to expend enormous resources to achieve this, nor should it be expected to do so. The Tribunal also criticized the FE exam requirement under the believe that it would disproportionately effect foreign applicants, but this was not the case – the FE exam has a pass rate of 85%. The Tribunal went further, requiring APEGA to establish a committee with the purpose of finding alternate ways of obtaining accreditation in lieu of confirmatory exams. APEGA was also required to provide a mentor to Mihaly to guide him and help integrate him with Canadian engineering. The Court found this to be unreasonable and questioned the Tribunal’s assessment of the required investment from APEGA [1].

The Court of Queen’s Bench’s decision was a full reversal of the Tribunal’s ruling. As well, Mihaly had requested a cross-appeal of the Tribunal’s decision not to award monetary compensation from APEGA. However, these claims were dependent upon the finding of prima facie discrimination. As the court had ruled that proof of discrimination had not been established, the cross-appeal was dismissed [1].

Reflection and Opinion

The Tribunal concluded that the Examination and Experience standards used by APEGA to assess Mr. Mihaly's credentials were discriminatory and unjustifiable under the Act. The Tribunal continues to state that most immigrants face "serious difficulty meeting certain requirements imposed by professional bodies" [2]. We do not agree with the claim that *most* immigrants face an extremely difficult time being registered as a professional engineer. At the Court of Queen's Bench hearing, it was stated that out of 1500 applications from internationally educated graduates, 60% are registered with no issues [2]. The remaining 40% are either advised to complete exams to objectively evaluate their credentials or possess relevant and sufficient experience. Mr. Mihaly was not denied registration based on his place of origin. He was subjected to the same admission procedure that all immigrants are required to go through. It is a fair and objective method of ensuring all registered engineers are capable of their profession at a standard level. Additionally, the claim that the assessments are too difficult for internationally educated graduates is not backed by statistical evidence. The FE exam has a pass rate of 85% [2]. Mr. Mihaly's stubborn refusal to write the FE or the confirmatory exams despite the encouraging pass rate was his own fault.

We agree with the Alberta Court of Appeal’s decision of both the reversal of the AHRC Tribunal’s ruling and not granting Mr. Mihaly’s cross-appeal based on his failure to meet the test for valid appeal restoration. The first consideration in restoring an appeal is "arguable merit to the appeal" [3]. Mr. Mihaly was not prepared with sufficient evidence to support the need to have the Court of Queen's Bench's decision reconsidered.

From the beginning, Mr. Mihaly’s claims against APEGA were questionable. In the AHRC’s claim of Mihaly’s complaint against APEGA, Mihaly had stated that he received two letters, from the Canadian Council of Professional Engineers, and Canadian engineering technologists, which confirmed his experience and education were acceptable. However, he submitted only one letter to APEGA, from the Canadian Council of Technicians and Technologists, not an engineering body [2]. The Tribunal also denied his $1,000,000 compensation claim for losses in wages against APEGA, concluding that the claims were unreasonable and employment was uncertain even with accreditation.

As well, he appeared not to hold any respect for APEGA's time. Three of the factors to consider in restoring an appeal include:

"I) an explanation for the defect or delay which caused the appeal to be taken off the list;

II) reasonable promptness in moving to cure the defect and have the appeal restored to the list;

III) intention in time to proceed with the appeal;" [2]

Despite the timely submission of the first appeal, he did not follow through and perfect the appeal. APEGA is not obliged to spend more time waiting for Mr. Mihaly to have his appeal ready.

APEGA was further instructed by the Tribunal to provide numerous resources for Mr. Mihaly to assist him in the registration process. We are in favour of the requests made by the Tribunal to accommodate Mr. Mihaly. These services (mentorships, committees of foreign-trained engineers, networking and language resources) would be greatly beneficial and helpful for immigrants. It would ease the transition into the workplace. However, this extremely involved level of accommodation should not be provided for every foreign-trained individual. It would require an exhaustive list of resources that APEGA was not fundamentally created for. Not all applicants should be granted an individualized assessment. It could be feasible to only offer individual assistance to those visibly struggling, but persistent to obtain designation as a professional.

APEGA should accommodate foreign-trained engineers and geoscientists. In fact, APEGA did create "the first position of its kind in Canada" to support internationally educated graduates (IEG) [4]. Guillermo Barreiro held the position of Manager, Internationally Educated Graduates Integration and Liaisons. In his role, he clarified the process for IEGs through personal communication methods. Between 2009 and 2012, the percentage of foreign-trained applicants received by APEGA has only been increasing [5]. It is only reasonable to have an existing program aimed to assist immigrants in the registration process. Immigrants have the potential to offer unique perspectives and expertise cultivated from their place of origin. It would be a waste of talent to have them turn away because of registration difficulties. The process should be clearly outlined, without any extra financial expenses incurred to the applicant.

We also believe that the confirmatory exams and FE exam are necessary requirements to ensure engineering competence. From personal experience, there is a distinction between possessing the necessary skills, and the ability to use those skills efficiently and dependably. Being familiar with Canadian engineering standards, codes of practice and associated regulations is a key accountability of all professional engineers. One important lesson taken from internship is that “qualified does not mean competent.” All too often accomplished engineers transition to fields or locations they are unfamiliar with, and are met with adverse consequences. Travelling to a new country, with different laws, practices, and standards is no different. Allowing an individual to accept a role of responsibility, where they may be responsible for others’ safety, without proving their competence, would be irresponsible of APEGA and contravene their responsibility outline in the EGPR.

References

[1] Association of Professional Engineers and Geoscientists of Alberta v Mihaly, 2016 ABQB 61, <https://www.apega.ca/assets/PDFs/mihaly-decision.pdf>, retrieved on 2018-02-08.

[2] Mihaly v. The Association of Professional Engineers, Geologists and Geophysicists of Alberta, 2014 AHRC 1 (CanLII), <http://canlii.ca/t/g3051>, retrieved on 2018-02-08.

[3] Mihaly v Association of Professional Engineers and Geoscientists of Alberta, 2017 ABCA 15, <https://www.apega.ca/assets/news-releases/2017-milhaly-court-decision.pdf>, retrieved on 2018-02-08.

[4] "APEGA Supports Internationally Educated Engineers", *Edmonton Region Immigrant Employment Council*, 2012, <http://eriec.ca/apega-supports-internationally-educated-engineers/>, retrieved on 2018-02-14.

[5] G. Barreiro, "How Apega is Helping Internationally Educated Graduates Navigate through Licensing Process Guillermo Barreiro APEGA", 2013, <http://legacy.aaisa.ca/wp-content/uploads/2013/03/How-Apega-is-Helping-Internationally-Educated-Graduates-Navigate-through-Licensing-Process-Guillermo-Barreiro\_APEGA.pdf>, retrieved on 2018-02-14.

[6] Moore v. British Columbia (Education), 2012 SCC 61, [2012] 3 S.C.R. 360