**ENGG 513**

**Report 1: Mihaly vs. APEGA Case Study Report**

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**Introduction:**

This report is based on the case study of ***Mihaly vs. APEGA*** [1]. Czechoslovakia engineer Ladislav Mihaly immigrated to Canada and applied to for registration as a Professional Engineer to APEGA in 1999. However he did not pass the assigned tests by APEGA and his application was withdrawn. Later after the reactivation of his application, he did not attend any further examination. Instead, he filed a human rights complaint against APEGA alleging discrimination based on his place of origin. In 2014, the Alberta Human Rights Commission determined that APEGA’s tests are discriminatory, and therefore require APEGA to pay Mr. Mihaly $10,000 in damages, as well as consider to exempt his tests. In 2016, APEGA appealed to the Court of Queen’s Bench, and the Court of Queen’s Bench decided to over-turn Human Rights Tribunal’s decision. At the same time, Mr. Mihaly’s cross-appeal was dismissed. Later in 2017, Mr. Mihaly applied to Court of Appeal of Alberta for restoring his appeal. However, this application was also dismissed.

In this report, the decision of the Court of Queen’s Bench of Alberta on APEGA, the Human Rights Commission, and Mr. Ladislav Mihaly will be studied in detail. During the research and analysis of this case, the main objective is to gain better understanding of APEGA’s registration requirements for professional engineers, its regulatory process, and the legal and quasi-legal environment in which APEGA operates. It also brings further thinkings about APEGA’s regulations for foreign-trained engineers.

**Stakeholders:**

The main stakeholders of this case are Mr. Mihaly, APEGA, the Alberta Human Rights Commission, and the Court of Queen’s Bench. Mr. Mihaly complaint that APEGA discriminated against him based on place of origin. His complaint was ruled by Alberta Human Rights Commission, who decided that APEGA should pay him $10,000 in damages, as well as consider to exempt his tests. APEGA then appeal to the Court of Queen’s Bench. The Court of Queen’s Bench upheld APEGA’s appeal and overturned Alberta Human Rights Commission’s decision. Another stakeholder is the Alberta Court of Appeal, where they dismissed Mr. Mihaly’s appeal about the Court of Queen’s Bench’s decision. Engineers Canada can be a stakeholder as well, since it contains the Canadian Engineering Accreditation Board (CEAB) and Canadian Engineering Qualifications Board (CEQB) who assess qualifications of engineers within or outside of Canada. The last stakeholder might be Canadian Council of Professional Engineers because they are in charge in setting up the Foreign Degree List for foreign-trained engineers.

**Background:**

Ladislav Mihaly was born in the former Czechoslovakia and obtained his two Master’s degree in Bratislava and Prague. After immigrating to Canada with the whole family, Mihaly first applied to be registered in APEGA as a Professional Engineer in May 1999. In this application, Mihaly provided qualification for his degrees as well as name of the reference that he had previously worked for Bratislava. While accepting his application, APEGA advised Mihaly that he was required to take the National Professional Practice Exam (NPPE). After evaluating Mihaly’s application, in Jan 2000 APEGA determined that his degree and work experience were not qualified therefore he must take three confirmatory exams and take a course or pass an equivalent exam in Engineering Economics, in addition to passing the NPPE. Mihaly failed the first attempt at the NPPE in February 2000, and did not attend the second attempt. As Mihaly did not pass the confirmatory exam by May 2001, APEGA withdrew his application on June 2001.

Mihaly applied to reactivate his application for registration in APEGA in May 2002, as he had a car accident and was unable to respond to APEGA earlier. APEGA accepted his application and advised him that he must write three confirmatory exams and take Engineering Economics course. However, Mihaly wrote to APEGA that he was shocked to hear his Master degrees do not match even the Bachelor’s degree in Alberta. Mr. Tokarik of APEGA responded that because Mihaly’s degree from Bratislava was listed in the Foreign Degree List as set out by Canadian Council of Professional Engineers, and there is no Mutual Recognition Agreement between Canada and former Czechoslovakia, therefore three confirmatory exams and a course or exam in Engineering Economics were the standard assessment in such a case. Mihaly later asked for a waiver according to his ten years of international experience, and was given a Reconsideration and Appeal Sheet, but he did not file the appeal. In August 2003, APEGA withdrew Mihaly’s application because he failed the NPPE and did not write the confirmatory exams within the specified period of time.

On October 2006, Mihaly asked APEGA to reactivate his application for a third time. After evaluating his updated resume, the Board of Examiner decided that he must pass the three confirmatory exams and a course/exam on Engineering Economics, because the Board determined that Mihaly’s work experience in Calgary was not an acceptable D level North American engineering experience. Mihaly did not write the examinations, and he filed a complaint with the Alberta Human Rights Commission (AHRC).

Mihaly filed his complaint under the Section 4, 7, and 9 under the Alberta Human Rights Act, in which Section 4 prohibits discrimination in food, services, facilities and accomodation; Section 7 prohibits discrimination in employment practice; Section 9 prohibits discrimination within organizations against any member. The respondent, APEGA, argued that the Human Rights Tribunal of Alberta “had no jurisdiction to consider Mihaly’s complaint because the Act does not protect against discrimination based on place of origin of academic qualifications”[1]. The decision of ***Grover v. Alberta Human Rights Commision*** [2] was brought up by the APEGGA, in which case the Court of Queen’s Bench ruled that “place of origin” does not include place where the person obtained her degree.

The complaint, Mr. Mihaly, provided evidence and witness to prove his qualification of being registered as Professional Engineer in APEGA. He presented the assessment of his foreign degree, the International agreements between his former country and Canada, the payment he made to learn Canadian interview skills, his work experience in engineering profession back in Europe, his attempts on the examinations, and the impacts upon his family. The respondent APEGA also presented witness and evidence to prove their procedure of Mihaly’s case is standard. The expert witness Dean David Lynch explained APEGA’s registration process by referring to Canadian Engineering Accreditation Board (CEAB), the France-Canada Accord, the Washington Accord, CEAB Substantially Equivalent Program, Foreign Degree List (FD List), and Fundamental of Engineering (FE) Examination. Dr. Gary Faulker and Mr. Mark Tokarik also provided more detailed registration process by APEGA, and concluded that Mihaly failed to pass the confirmatory exams and the FE exam or NPPE. Therefore APEGA persisted in the decision they made.

Mihaly successfully testified for himself that he experienced a *prima facie* discrimination, which is the prerequisite for establishing a human right complaint. Mihaly demonstrated that he was adversely impacted by APEGA process of registration because of his “place of origin”. The Council decided that APEGA did not conduct meaningful individualized assessment on Mihaly’s education, and that the imposition of Mihaly’s examinations was not “for the purpose of correcting a perceived academic deficiency”. Council also acknowledged that APEGA’s policy of “one year Canadian experience” was unreasonable because this would lead to many International Engineering Graduates (IEGs) to low-income jobs just to satisfy APEGA’s requirement. Due to the reasons above, Council decided that APEGA constitutes discrimination.

In February 2014, Alberta Human Rights Tribunal ruled the tests were discriminatory and ordered the APEGGA to reconsider Mihaly's application and pay him $10,000 in damages, as well as review Mihaly’s perceived academic deficiencies and consider to exempt his examinations. APEGA must also provide Mihaly resources to network and English language, and to guide him into the Canadian engineering profession. A Commission must also be established to consider individualized assessment for IEGs like Mihaly.

The Tribunal’s decision was under appeal and cross-appeal by APEGA and Mihaly, as they both filed appeal on November 2014. APEGA appealed for the Court to reverse the order from Tribunal, and Mihaly’s cross-appeal was only related to his remedy. The Tribunal was requested to answer legal issues regarding “the impact of this Court’s decision in ***Grover v Alberta***” [2] the test for *prima facie* discrimination, and “the test for defence of a *bona fide* occupational requirement”. The appeal hearing proceeded on July 2015. The appellant, APEGA, raised issues regarding the procedural fairness, *prima facie* discrimination, and jurisdiction on Tribunal’s decision of discrimination and registration requirements. The Court determined that Tribunal had not breached procedural fairness. The Tribunal had not lacked jurisdiction on the decision of discrimination, but its finding of *prima facie* discrimination was unreasonable.

On January 2016, the Court ordered the decision of Tribunal to be reversed. Consequently, Mihaly’s cross-appeal was dismissed. In January 2017, Mr. Mihaly applied to the Alberta Court of Appeal, hoping to restore his appeal. However, the Alberta Court of Appeal dismissed his application again [6].

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

As discussed in the previous section, the appellant APEGA brought issues regarding the procedural fairness, the *prima facie* discrimination, and jurisdiction on Tribunal’s decision of discrimination and registration requirements. First, APEGA argued that they were not given chance to address when the Tribunal determined their examination to be unreasonable. APEGA referred to the case of ***Amacon Property Management Services Inc. v Dutt*** [3], in which the landlord was not given the opportunity to address to questions before the arbitrator at the hearing. The Court ruled that the arbitrator had not made fair conclusion since both sides should be given opportunity to be heard. However, in ***Amacon*** the arbitrator failed to give landlord opportunity to address to “new ground” of decision. While in this case, the Tribunal was not required to give APEGA opportunity to be heard on “every point of law that they refer to”[4]. Therefore, the Court decided that the Tribunal had not breached rules of procedural fairness.

Secondly, APEGA argued that the Tribunal “had no jurisdiction over Mihaly’s complaint” because AHRA cannot protect discrimination against “place of origin of academic qualification”, as it is different from “place of origin”. They referred to the ***Grover v Alberta***, in which the Court held that the “place of origin” meant “where you came from”, instead of “place of birth”. However, the context was different for Grover and Mihaly because the latter had a clear linkage between “place of birth” and his admission into APEGA. The ***Moore*** test [5] established that *prima facie* discrimination requires the victims to demonstrate they have characteristics protected from discrimination and that they experienced adverse impact due to their characteristics, which Mihaly experienced due to his foreign education background. Because of the lack of connection between Mihaly and Grover’s case, the ***Moore*** test was the more suitable way to determine *prima facie* discrimination. Therefore, the Court held that the Tribunal did not lack jurisdiction over Mihaly’s complaint.

Thirdly, APEGA argued that the establishment of *prima facie* discrimination also required the adverse impact to be based on arbitrary and stereotypical treatment, in addition to ***Moore*** test. The Court determined that arbitrariness and stereotype are linked to *prima facie* discrimination, but are not required elements. The key issue is whether Mihaly’s place of origin was an adverse impact, which the Court decided it was because Mihaly lacked opportunity to avoid writing the confirmatory examinations. However, Mihaly’s place of origin was unrelated to the fact that he failed the confirmatory exams, because the NPPE was required of all applicant regardless of their education. Also, there were too many uncertainties relating Mihaly’s place of origin to finding Canadian engineering jobs. Therefore, the *Moore* test did not apply to neither NPPE nor Canadian experience. The Court decided that Tribunal’s finding of *prima facie* discrimination was unreasonable.

Lastly, the Court decided that the Tribunal’s interpretation on APEGA’s examinations was unreasonable. The examinations were only entry level and should not be difficult for international graduates. The foreign graduates were only expected to demonstrate the basis of their profession. Tribunal’s suggestion of APEGA providing more resource for foreign engineers was also unreasonable because it was beyond capability of most professional regulatory bodies. In the end, the Court concluded that the Tribunal’s decision of Mihaly’s establishment of *prima facie* discrimination was reasonable, but its conclusion that APEGA failed to justify the examination requirement was unreasonable.

As for the disposition, APEGA’s appeal for a reversal of the decision of the Human Rights Tribunal was approved by the Court. Mihaly’s cross-appeal for remedy of cost was dismissed since no *prima facie* discrimination was found.

**Reflection and Opinion:**

At the first stage of the case, the Alberta Human Rights Commission decided that APEGA’s policies did discriminate against Mr. Mihaly. It required APEGA to pay him $10,000 as well as consider to exempt his test. However, we disagree with the Tribunal’s decision, where they decided that APEGA’s requirement for Mr. Mihaly to write the NPPE test was discriminatory. National Professional Practice Exam (NPPE) is the required test for all engineers in Canada who wants to exercise as a professional engineer. The test confirms the engineer’s knowledge in professionalism, law, and ethics, which ensures that they will perform their job in a legal, ethical, and professional manner. Other required tests are also for the purpose of assessing the engineer’s professional knowledge and skills, which are always the requirement for a professional engineer, regardless of the place where they were educated. Therefore we believe that APEGA’s requirement for Mr. Mihaly to write the tests is not discriminatory against his place of origin. Another decision we also disagree on is the requirement for APEGA to consider to exempt Mr. Mihaly’s test. Mr. Mihaly already failed the test for a few times, this indicated that he might have some problems in either academic or the language. In this case, if APEGA simply exempt the test, they might be allowing someone without enough skills to exercise as an professional engineer. This will not only mess up the standard for professional engineers, but might also be irresponsible for the clients. Therefore, we also disagree on the Tribunal’s decision that APEGA should consider to exempt the test. However, we did agree with the opinion that APEGA should provide Mr. Mihaly with support in networking and English language, and guide him into the Canadian engineering profession. Most foreign-trained engineers will experience difficulties in language and networking, but this does not mean they are lack of the professional skills. Therefore providing them with support will give them equal opportunity to compete with local engineers, and will also give them a chance to apply their professional knowledges and skills for the benefit of the society.

The second stage of the case is when APEGA appealed to the Court of Queen’s Bench about the decision of Alberta Human Rights Commission. After comparison and analysis of the referred cases, the Court of Queen’s Bench decided that APEGA’s arguments that the Alberta Human Rights Commission breached rules of procedural fairness and lacked the jurisdiction over Mihaly’s complaint did not apply. However, the Court also decided that AHRC’s finding of *prima facie* discrimination, and the conclusion that APEGA failed to justify the examination requirement were unreasonable. Therefore the Court of Queen’s Bench upheld APEGA’s appeal and overturned the decision of Alberta Human Rights Commission. Our opinion is that we agree with the decision of the Court of Queen’s Bench. We believe that the NPPE and other assigned tests are only for testing the basic knowledge and skills of the engineer, which are necessary for all engineers regardless of their place of education. Therefore Mr. Mihaly’s allegation and AHRC’s judgment that APEGA demonstrated *prima facie* discrimination on him is unjustified. Also, the exams are designed by professionals who have profound understanding of the required knowledge for engineers. The contents of the exams are designed to reveal the knowledge and skill level of the engineer, while still maintain a certain level of difficulty that can allow people to pass after studying the provided materials. Even if the individual failed the test, APEGA will provide them a report, stating their areas of improvement. We think APEGA had provided enough material for engineers to study for the exam, therefore we agree with the Court of Queen’s Bench’s judgment that the requirements of the examination are justified. However, we did not agree fully with the Court’s statement that the Tribunal’s suggestion for APEGA to provide more resources for foreign engineers was unreasonable due to the capability of most professional regulatory bodies. As the organization who regulates all professional engineers around Alberta, we believe that APEGA do have the responsibility to provide support for foreign engineers who want to enter the career.

The case then entered into the third and final stage, where Mr. Mihaly appealed to the Alberta Court of Appeal about the judgment of the Court of Queen’s Bench. However, after reviewing all relevant factors, the Alberta Court of Appeal decided to dismiss this application. We agree with their decision because we believe that the Court of Queen’s Bench already did a thorough consideration on all the factors of this case. They reviewed the reasoning behind the Alberta Human Rights Commission’s decision, as well as the issues brought up by APEGA in the appeal. Since the Court of Queen’s Bench’s decision was carefully considered, this should be the final decision of the case. The Alberta Court of Appeal also stated that Mr. Mihaly did not provide enough determinative arguments on the Court of Queen’s Bench’s decision, therefore he did not met the condition for the Court to restore his appeal.

In conclusion, although we agree with the decision of the Court of Queen’s Bench to overturn the Alberta Human Rights Commission’s judgment, we do believe that there are some insufficiencies in APEGA’s policies for foreign-trained engineers. Comparing with other countries, Canada has more strict standards for professional engineers. This can results in some difficulties when evaluating the degrees and skills of foreign-trained engineers. In the case, Mr. Mihaly’s two Czech master degrees are only equivalent to bachelor degrees in Canada according to the Foreign Degree List, and this became one of the causes of Mr. Mihaly’s complaints. Canada only has Mutual Recognition Agreement with a few countries, and its Foreign Degree List does not include all degrees in every countries. Therefore there will always be some people with their degrees not recognized in Canada. Those people spent a long time on the degree and might already had the required knowledge and skills. It will be unfair for them to spend extra time and money on writing more tests, simply because their degrees are not recognized. The solution for this problem can be by encouraging communications in engineering programs between Canada and other countries. This is not a process that can be achieved in short term. However, as time passes, we believe that in the future, Canada will evaluate and recognize more degrees, and made it more fair for foreign-trained engineers. Beside the issues on degrees evaluation, foreign-trained engineers might also experience difficulties in completing the required tests. These difficulties might due to language, resources and etc. In this case, we believe that APEGA should provide them with some support in preparing for the tests, and in building networks for future careers. This kind of support can simply be providing them with some courses in language or in preparation for the exams. It can also be inviting professional engineers to do some presentations for them, allowing them to gain a better understanding of Canada’s regulations on professional engineers, as well as giving them a chance to network with people inside the profession.

**Reference:**

[1] Mihaly v The Association of Professional Engineers, Geologists and Geophysicists of Alberta (2014) AHRC 1 (CanLII), Feb. 2014. [Online]. Available: https://www.canlii.org/en/ab/abhrc/doc/2014/2014ahrc1/2014ahrc1.html?searchUrlHash=AAAAAQAGTWloYWx5AAAAAAE&resultIndex=2

[2] Grover v Alberta Human Rights Commission (1997), A.J. No. 88 (Q.B.), 1999 ABCA 240 (C.A.).

[3] Amacon Property Management Services Inc. v Dutt (2008), 2008 BCSC 889, 2008 CarswellBC 1423.

[4] Association of Professional Engineers and Geoscientists of Alberta v Mihaly (2016), ABQB 61, Jan. 2016. [Online]. Available: http://www.apega.ca/assets/PDFs/mihaly-decision.pdf

[5] Moore v British Columbia (Education), 2012 SCC 61 at para 33, [2012] 3 SCR 360

[6] In the Court of Appeal of Alberta, “Mihaly v Association of Professional Engineers and Geoscientists of Alberta”, ABCA 15, Jan. 2017. [Online]. Available: https://www.apega.ca/assets/news-releases/2017-milhaly-court-decision.pdf