

# *Mihaly v. APEGA:*

Lessons Learned and Strategic Responses by  
Regulators

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# History of the Case

- ▲ 1999: applies to APEGA to be registered as Professional Engineer.
- ▲ 2000: BOE decision:
  - 1. Write the NPPE
  - 2. Write 3 confirmatory examinations
  - 3. Write engineering economics
- ▲ 2000 -2003: NPPE written 3 times and failed 3 times. Application withdrawn and later reactivated.

# History of the Case

- ▲ 2006: application reactivated again.
- ▲ 2007: BOE reconsiders application. Confirms must pass the NPPE, write the confirmatory examinations or the FE, and must obtain 1 year of Canadian engineering experience.
- ▲ 2008: Mr. Mihaly does not attempt any further examinations. Files human rights complaint against APEGA alleging discrimination based on place of origin.

# History of the Case

- ▲ 2008 to 2012: Complaint investigated and dismissed without a hearing. Appeals to Chief Commissioner who directs that the complaint proceed to a hearing.
- ▲ 2013: hearing before the Hearing Rights Tribunal

# History of the Case

- ▲ 2014: Decision of Human Rights Tribunal finding that system for evaluating Mihaly's credentials constituted systemic discrimination. Directed that application be reconsidered, awarded damages of \$10,000. APEGA directed to appoint committee to assist Mihaly, match with mentor and direct Mihaly to networking and language resources.

# History of the Case

- ▲ 2015: Appeal by APEGA heard. Cross-appeal by Mihaly seeking to increase damages to millions.
- ▲ 2016: Decision of the Court of Queen's Bench over-turns Human Rights Tribunal decision. Court concludes that decision was "rife with logical errors", "findings of

# History of the Case

fact unsupported by the evidence”, “failures to take into account relevant considerations”, “unreasonable interpretations” of the legislation; and many other errors. Mihaly’s cross appeal dismissed.

- ▲ 2016: Mihaly appeals to Court of Appeal but fails to take the required steps to advance the appeal so the appeal was struck. Mihaly applies to the Court of Appeal to restore the appeal.

# History of the Case

- ▲ 2017: Court of Appeal refuses to allow the appeal to proceed. APEGA is entitled to have some finality to proceeding which questions its procedures for evaluating foreign credentials. As for the merits of the potential appeal, Court finds that Mihaly did not point to any patent error in the QB decision.



# Final Outcome

- ▲ Strong endorsement of APEGA's system to evaluate credentials of internationally educated credentials.
- ▲ Strong endorsement of public protection function.
- ▲ Decision in *Mihaly v. APEGA* considered one of the most important regulatory cases in Canada in 2016.

# Top 10 Lessons for Regulators from *Mihaly v. APEGA*

1. Place of education may be a protected ground under human rights legislation.

- ▲ “Place of higher education” is not explicitly a protected ground under human rights legislation.
- ▲ As a result we argued there was no jurisdiction to consider complaints based on “place of higher education”.

- ▲ Some tribunals have considered place of “higher education” to be a “proxy” for “place of origin” due to connection between the two. In *Mihaly*, tribunal and Court of Queen’s Bench accepted this argument.
- ▲ We intended to argue before Court of Appeal that this was an error. However, *Mihaly*’s appeal was struck so did not have opportunity.

- ▲ Decision in *Mihaly* provides strong defences for regulators but does not provide a jurisdictional defence.
- ▲ Other regulators facing claims of systemic discrimination from internationally educated applicants should consider advancing the jurisdictional defence in addition to defences on the merits.

2. It is not discriminatory to distinguish between education programs of different countries if the distinctions are based on actual knowledge of the programs.

- ▲ Human Rights Tribunal found that APEGA made discriminatory assumptions by waiving examination requirements for international applicants from countries with which APEGA had a Mutual Recognition Agreement but not waiving examination for applicants from other countries.



- ▲ Court held that conclusion about discriminatory assumptions not supported by the evidence.
- ▲ Distinctions between MRA and non-MRA countries were based on knowledge of programs rather than discriminatory assumptions.

3. It is not discriminatory to require international applicants to meet the same entry-level competency requirements other applicants must meet, such as a standard exam and one-year Canadian experience.

- ▲ Court held imposing the same entry –level competence requirement is not prima facie discriminatory.
- ▲ Mr. Mihaly failed the NPPE 3 times but no evidence that related in any way to his place of origin.
- ▲ A neutral rule can still lead to a finding of systemic discrimination if adverse impact due to protected ground under human rights legislation.

- ▲ No evidence of adverse impact on international applicants because of place of origin.
- ▲ All regulators in every field should expect scrutiny of any Canadian experience requirement. Be ready to defend the necessity of the requirement and justify why it doesn't impose unreasonable barrier.

4. It is justifiable to require international applicants to write special confirmatory exams to establish entry-level competency to protect public safety.

- ▲ Court rejected argument that requirement to write confirmatory examinations based upon assumptions that international applicants had inferior academic credentials.
- ▲ Court accepted that requirement imposed where APEGA had insufficient knowledge about the particular education program.

5. The duty to accommodate does not require the regulator to fundamentally alter its standards or act outside of its role.

- ▲ Tribunal ordered APEGA to establish committee to develop alternative approaches for Mr. Mihaly such as exemptions from examinations, offering courses and programs, and providing assistance and mentorship to help him progress and integrate into the engineering profession.



- ▲ Court held that such orders inappropriate since required APEGA to fundamentally alter its standards and act outside of its regulatory role.

6. Standardized testing is not mutually exclusive with individual assessment.

- ▲ Human Rights Tribunal found that APEGA had not sufficiently focused on an individualized assessment of Mr. Mihaly's credentials.
- ▲ Court disagreed given that APEGA considered whether Mr. Mihaly's education and experience justified waiving the confirmatory examinations.

- ▲ In order to defend human rights complaints, all regulators need to be able to demonstrate that they engaged in a proper individualized assessment.
- ▲ Once that individualized assessment is completed, then can use tools such as standardized examinations if the individualized assessment demonstrates that the examination is appropriate.

7. The international applicant has a reciprocal duty to assist the regulator in finding accommodation.

- ▲ Under human rights legislation, those seeking an “accommodation” based on human rights legislation have a duty of cooperation.
- ▲ The Court found that Mr. Mihaly failed in his duty of cooperation by refusing to even attempt the FE examination.

8. Human rights complaints remain areas of high risk for regulators.

The high risk arising from defending human rights claims of systemic discrimination arises from:

- ▲ Extraordinary delays in the human rights process increases the risk of large damage awards



- ▲ The natural sympathy evoked by internationally educated applicants seeking to practice their profession in Canada.
- ▲ In some cases, inexperienced adjudicators.

To manage the risk regulators should take a proactive approach and:

- ▲ Conduct an internal review of procedures identifying where there is a risk of human rights complaints.
- ▲ Consider whether assessment procedures are individualized, rigorous, fair, and accessible to applicants.

- ▲ Are your tests psychometrically defensible?
- ▲ Identify if there are procedures that are potentially prima facie discriminatory.
- ▲ If so, consider how the regulator would advance a compelling argument of justification.
- ▲ Amend procedures as appropriate.

9. Human rights issues should be raised and dealt with in the regulatory process if possible.

- ▲ Mr. Mihaly did not raise his human rights concerns with APEGA prior to filing his complaint with the Human Rights Commission.
- ▲ As a result APEGA did not have an opportunity to address the human rights issues in the regulatory process.

- ▲ Regulatory bodies have a duty to address human rights issues when the issue arises as part of the regulator's overall statutory jurisdiction.

- ▲ If a regulator rules on a human rights issue and a dissatisfied individual subsequently files a complaint with a human rights commission, then a regulator may be able to successfully object to the complaint proceeding based on the doctrines of issue estoppel and abuse of process.

- ▲ Generally, if a human rights issue is raised in the regulatory process, a regulator may wish to provide a ruling on the human rights issue to properly carry out its responsibilities and thus create the opportunity to argue issue estoppel and abuse of process.
- ▲ Obtain legal advice as soon as a human rights issue arises.



## 10. Self-represented complainants present additional challenges.

- ▲ Legal counsel defending human rights complaints against self-represented persons should invite human rights adjudicators to advise whether there are any issues of concern on which they have not made submissions.
- ▲ This should not be necessary but it is a good defensive strategy when adjudicators are inexperienced.

- ▲ A powerful narrative has taken hold in the public conscience with respect to internationally educated professionals seeking licensure facing unfair hurdles imposed by bureaucratic regulators.

- ▲ This narrative can be extremely influential to human rights adjudicators and, in my opinion, affected the Human Rights Tribunal decision in *Mihaly v. APEGA* even though there was no supporting evidence.

- ▲ Everyone benefits by ensuring that internationally educated professionals have access to individualized, timely and fair assessment processes that focus on whether the applicant has the entry-level competence expected in Canadian professional practice.

- ▲ Regulators need to ensure their own processes justify the following “narrative” and then promote this “narrative”:

*“We welcome applicants from around the world. We have an individualized, fair, cost-effective and accessible assessment process for internationally educated graduates that determines in a rigorous*

*way if the applicant possesses the entry level competencies required to practice in our province. In this way, we fulfill our statutory obligation of protecting the public by ensuring that all applicants possess entry-level competency while also providing a fair opportunity to internationally educated applicants to be registered in our jurisdiction.”*

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