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Regulators Breathe a Sigh of Relief: Registration of Foreign-Trained Professionals

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Background

In a recent decision, Justice Ross of the Court of Queen's Bench of Alberta considered whether a foreign-trained engineer's human rights had been violated by the Association of Professional Engineers and Geoscientists of Alberta (the "Association") when it required him to fulfil certain requirements before he could register as a professional engineer in that province.

In an important decision for professional regulators across the country, the Court reversed the Alberta Human Rights Tribunal's decision and found that the Association did not infringe the engineer's rights under the *Alberta Human Rights Act*[1]. The Court affirmed that professional regulators have the right to require foreign-trained applicants to fulfil registration requirements, including standardized tests, to ensure they are competent to practise the regulated profession safely. The "Lessons Learned" from this decision are outlined at the end of this article.

Summary of *Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* ("Court Decision")[2]

The Association has the authority to regulate the practices of engineering and geoscience in Alberta pursuant to the *Engineering and Geoscience Professions Act*[3] and its *General Regulation*[4]. The Association's Board of Examiners considers applications for registration in accordance with the requirements outlined in the *General Regulation*, which include passing the National Professional Practice Exam ("National Exam") and possessing the required academic qualifications and experience.

The academic qualifications requirement is met by either (i) graduating from an accredited institution or (ii) registration as an "examination candidate" through the completion of supplementary examinations. These supplementary examinations may, in some cases, be waived if an applicant has certain kinds of post-graduate training or engineering experience.

Ladislav Mihaly was trained as an engineer in his native country, the former Czechoslovakia. After emigrating to Canada, Mr. Mihaly applied to the Association to become a professional engineer in Alberta. Like all applicants, Mr. Mihaly was required to write the National Exam. However, because his degrees did not come from accredited institutions, he was considered to be an "examination candidate." As a result, he was required to also complete three confirmatory examinations[5] and to fulfil an Engineering Economics requirement within a specified time-frame. On his first attempt at registration, Mr. Mihaly failed the National Exam and did not complete the confirmatory exams.

Upon reconsideration of Mr. Mihaly's application, the Association found that not only did Mr. Mihaly have to complete the above-noted requirements but he also had not acquired the one year of Canadian professional engineering experience that was a prerequisite to registration.

Mr. Mihaly did not complete the requirements, but instead brought a human rights complaint alleging that he was discriminated

against on the basis of his place of origin in violation of s. 4 of the *Alberta Human Rights Act.*

Alberta Human Rights Tribunal Decision ("Tribunal Decision")**[6]**

The Alberta Human Rights Tribunal found that the examination and experience standards used by the Association to assess Mr. Mihaly's education credentials were discriminatory and without sufficient justification under the *Alberta Human Rights Act*. The Tribunal also found that the Association's policies were based on the discriminatory assumption that the qualifications of engineers trained at non-accredited foreign institutions fail to meet Canadian standards.

Notably, the Tribunal found fault in the Association's use of a standardized assessment instead of "more individualized assessment or the exploration of other options."**[7]**

The Tribunal awarded Mr. Mihaly $10,000 in general damages and ordered the Association to reconsider his application. The Association appealed the Tribunal Decision.**[8]**

Court Decision

The Association raised a number of issues on appeal, including that (i) the Tribunal erred in its *prima facie* discrimination analysis and (ii) the Tribunal erred in finding that the Association's registration requirements were not justified.

(i) *Prima facie* discrimination

The Court found that the Tribunal applied the correct legal test for *prima facie* discrimination**[9]**. To establish adverse effect discrimination, a complainant must show:

he has a characteristic that is protected from discrimination;
b. he has experienced an adverse impact; and
c. the protected characteristic was a factor in the adverse impact.

The Court upheld the Tribunal's finding of *prima facie* discrimination on the basis that: (a) Mr. Mihaly's foreign educational credentials (as a proxy for his place of origin) are a protected characteristic under the *Alberta Human Rights Act*; (b) Mr. Mihaly experienced an adverse impact because he was required to write the confirmatory examinations; and (c) Mr. Mihaly's place of origin was a factor in this requirement.

However, the Court found that the Tribunal went too far in finding *prima facie* discrimination with respect to the requirements that Mr. Mihaly pass the National Exam and possess one year of Canadian professional engineering experience. The Tribunal failed to consider these two requirements through the lens of the three-part legal test, and there was insufficient evidence to find that they were *prima facie* discriminatory.

Further, the evidence did not support the Tribunal's finding that the Association's policies are based on discriminatory assumptions. The Court concluded that:

"the distinction between accredited or equivalent programs and other programs is not based on assumptions, but on knowledge about the programs. When [the Association] distinguishes between graduates of known and tested engineering programs as compared with graduates of relatively unknown programs, it is not assuming that the latter have inferior academic qualifications. Equally, it is not assuming that they have a substantially equivalent education. It simply does not have the information to know."**[10]**

(ii) Justification

The Association also argued on appeal that the Tribunal erred in finding that the Association was not justified in its discrimination. Under s. 11 of the *Alberta Human Rights Act*, discriminatory conduct can be found not to violate this *Act* where it is "reasonable and justifiable in the circumstances." To establish justification, the defendant must prove:

it adopted the standard for a purpose or goal that is rationally connected to the function being performed;
b. it adopted the standard in good faith, in the belief that it is necessary for the fulfilment of the purpose or goal; and
c. the standard is reasonably necessary to accomplish its purpose or goal, in the sense that the defendant cannot accommodate persons with the characteristics of the claimant without incurring undue hardship.

The Tribunal applied this test and found, under part (c), that the Association did not reasonably accommodate Mr. Mihaly. It was determined that he should have been individually assessed and, instead of requiring him to write a standardized "one size fits all" test, the Association should only require examinations that correct perceived deficiencies identified by this individual assessment.

However, the Court found the Tribunal's reasons "rife with logical errors, findings of fact that are not supported by the evidence, and failures to take into account relevant considerations."**[12]** Particularly, the Court rejected the Tribunal's unfounded conclusion that a standardized examination has a disproportionate impact on foreign-trained applicants. As numerous other tribunals have found, "professional regulators are justified in assessing credentials through examinations."**[13]**

The Court also found that the Tribunal's "directions [regarding the extent of individual assessment to which Mr. Mihaly was entitled] go beyond the scope of any discriminatory conduct found or even alleged."**[14]** The Tribunal erred by failing "to consider the impact that this form of accommodation would have on [the Association], fundamentally altering its standards and being required to act outside of its regulatory role."**[15]** The Court stated that "regulatory bodies should not be expected to change their mandate in a fundamental way."**[16]** The Association already engages in individual assessment when it considers whether to waive the examination requirements for applicants with sufficient post-graduate training or engineering experience. The quality of Mr. Mihaly's engineering experience was simply found to be insufficient to waive the requirements.

Finally, the Court found that Mr. Mihaly also had an "obligation to assist in the search for possible accommodation," which the Tribunal failed to consider in its analysis.**[17]**

On the basis of all of the above, the Court found that the Association's standardized confirmatory examinations were reasonable and justifiable in the circumstances and reversed the Tribunal's decision.

Lessons Learned

Standardized examinations applicable to all applicants are not *prima facie* discriminatory.

- The Court found that it is not *prima facie* discriminatory to require foreign-trained applicants to complete the National Exam, which all applicants must complete.
- However, this examination requirement may be found discriminatory where there is evidence that (i) a foreign-trained applicant experiences disadvantage as a result of this requirement and (ii) his national origin is a factor in this disadvantage.

The "Canadian experience" requirement was found not to discriminate, but Ontario courts and tribunals may decide otherwise.

- The Court found that it is not *prima facie* discriminatory to require foreign-trained applicants to obtain one year of Canadian professional engineering experience, even if they have difficulty finding a position in Canada.

- However, the Court noted that where a foreign-trained applicant can establish that his difficulty in finding employment is related to his national origin, the "Canadian experience" requirement may be found to be discriminatory.
- Furthermore, the Court Decision contradicts the Ontario Human Rights Commission's *Policy on Removing the "Canadian experience"* barrier. According to this provincial *Policy*, "a strict requirement for Canadian experience' is *prima facie* discrimination (discrimination on its face) and can only be used in very limited circumstances."**[18]**

Requiring foreign-trained applicants to complete additional examinations is prima facie discriminatory

- In its analysis, the Court distinguished between the Association's requirements for all applicants (like the National Exam) and those restricted to foreign-trained applicants (like the confirmatory examinations).
- In a *prima facie* discrimination analysis, "place of origin" is closely connected to "place of training." The Court held that "in view of the close link between Mr. Mihaly's place of origin and the place of his education, and the lack of any real opportunity for him to avoid the adverse impact that arose from being educated in his place of origin, I conclude that Mr. Mihaly's place of origin was a factor in the adverse impact."**[19]**

Professional regulators should not be held to onerous accommodation obligations. The impact of accommodation on the regulatory methods used by a professional regulator, as well as cost and available resources, must be considered.

- The Court criticized the Tribunal's outright dismissal of standardized testing as a reasonable method of evaluation in the registration process. Rather, individual assessment is only part of the analysis when determining whether accommodation is possible without undue hardship.
- Overturning the Tribunal's finding, the Court found that professional regulators are not obligated to "become proactive and discuss and negotiate [accreditation] agreements with other institutions (and to the extent it is able, other countries) from which engineers come to Canada."**[20]**
- In its decision, the Court undertook a fulsome analysis of the Association's policies, governing legislation and registration process. Considering the rationale behind the Association's policies, and the reasons why the Association distinguishes between accredited and non-accredited foreign

[1] *Alberta Human Rights Act,* R.S.A. 2000, c.A-25.5
[2] *Association of Professional Engineers and Geoscientists of Alberta v. Mihaly*, 2016 ABQB 61.
[3] *Engineering and Geoscience Professions Act*, R.S.A. 2000, c. E-11.
[4] *Engineering and Geoscience Professions General Regulation*, Alta. Reg. 150/1999.
[5] The requirement to pass three confirmatory examinations can also be satisfied by completing the FE Exam, which is set by the National Council of Engineering Examiners and Surveyors in the US.The Association's current preference is to use the FE Exam rather than other confirmatory examinations. Confirmatory examinations and the FE Exam can be understood as interchangeable in this article.
[6] *Mihaly v. The Association of Professional Engineers, Geologists and Geophysicists of Alberta*, 2014 AHRC 1.
[7] Tribunal Decision para. 242; quoted in Court Decision para. 18.
[8] The Tribunal did not award Mr. Mihaly the lost wages he sought due to insufficient evidence and a lack of causal connection between any lost wages and the discrimination he faced. Mr. Mihaly cross-appealed on the issue of lost wages. His appeal was dismissed.
[9] This test was iterated by the Supreme Court of Canada at para. 33 in *Moore v. British Columbia (Education),* 2012 SCC 61, [2012] 3 S.C.R. 360.
[10] Court Decision para. 85.
[11] This test was iterated by the Supreme Court of Canada at para. 54 in *British Columbia (Public Services Employee Relations Commission) v. BCGEU*, [1999] 3 S.C.R. 3, 176 D.L.R. (4th) ("*Meiorin*").
[12] Court Decision para. 149.

[13] Court Decision para. 136.
[14] Court Decision para. 146.
[15] Court Decision para. 147.
[16] Court Decision para. 147.
[17] Court Decision para. 148.
[18] Ontario Human Rights Commission's Policy on Removing the "*Canadian experience*" barrier at p. 3. Pursuant to this *Policy*, a regulator has the burden of establishing on a balance of probabilities that its "Canadian experience" requirement: (1) was adopted for a purpose or goal that is rationally connected to the function being performed; (2) was adopted in good faith, in the belief that it is needed to fulfil the purpose or goal; and (3) it is reasonably necessary to accomplish its purpose or goal, because it is impossible to accommodate the claimant without undue hardship (p. 11).
[19] Court Decision para. 103.
[20] Tribunal Decision para. 203; quoted in Court Decision para. 121.

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