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Clerk of the Court

Court of Queen's Bench of Alberta

Citation: Association of Professional Engineers and Geoscientists of Alberta v Mihaly, 2016 ABQB 61

Date:
Docket: 1403 02684
Registry: Edmonton

Between:

The Association of Professional Engineers and Geoscientists of Alberta

Applicant
(Respondent on Cross-Appeal)

- and -

Ladislav Mihaly
and Alberta Human Rights Commission

Respondents
(Applicant on Cross-Appeal)

- and -

Law Society of Alberta

Intervener

Reasons for Judgment
of the
Honourable Madam Justice J.M. Ross

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Introduction

[1] This is an appeal by the Association of Professional Engineers and Geoscientists of Alberta [APEGA] against the decision of the Alberta Human Rights Tribunal [Tribunal], issued on February 6, 2014 [Tribunal Decision]. Mr. Ladislav Mihaly [Mr. Mihaly or Respondent] had complained that APEGA discriminated against him in relation to his application to be registered as a professional engineer. The Tribunal found that APEGA discriminated against Mr. Mihaly on the grounds of his place of origin, by refusing to recognize his education as the equivalent of an engineering degree from an accredited Canadian University, and by requiring him to write certain examinations to confirm his academic credentials.

[2] The Respondent cross-appeals the Tribunal's refusal to award him damages for loss of income, and seeks an award of $1,000,000.00 and registration with APEGA, or alternatively, $2,000,000.00 if not registered as a professional engineer with APEGA.

Mr. Mihaly's Application and Complaint

[3] The facts, which are not in dispute by the parties to this appeal/cross-appeal, are thoroughly outlined in the decision under appeal (indexed as ***Mihaly v The Association of Professional Engineers, Geologists and Geophysicists of Alberta***, 2014 AHRC 1 [or Tribunal Decision]). However, for ease of reference, I have provided below a summary of relevant facts.

[4] Mr. Mihaly was born and educated in the former Czechoslovakia. He obtained a M.Sc. Diploma with a specialization in Technology of Fuels and Thermal Energy from the Slovak Technical University in Bratislava [UBS] in 1975. He obtained a Certificate in Corrosion Engineering from the Institute of Chemical Technology [ICT] in Prague in 1981.

[5] In May 1999, after immigrating to Canada, Mr. Mihaly applied to APEGA for registration as a Professional Engineer.

[6] In a letter dated May 13, 1999, APEGA acknowledged Mr. Mihaly's application, requested his transcripts, and advised him that he was required to write the National Professional Practice Exam [NPPE]l

[7] APEGA's Board of Examiners reviewed the Respondent's materials in support of his application. On February 11, 2000, APEGA advised him that: (i) he must, in addition to passing the NPPE, complete three confirmatory examinations and take a course or pass an equivalent examination in Engineering Economics by May 2001; and (ii) he had failed his first attempt at the NPPE, which he had written on January 17, 2000.

[8] On August 1, 2000, Mr. Mihaly applied to write the NPPE on October 16, 2000 for a second time. Mr. Mihaly, however, did not attend on that day to write the test.

[9] On June 29, 2001, APEGA advised Mr. Mihaly that it had withdrawn his application for registration as a Professional Engineer since he had failed to write the required confirmatory examinations by May 2001.

[10] On May 31, 2002, Mr. Mihaly asked APEGA to reactivate his application for registration. He also applied to write the NPPE on July 15, 2002. Mr. Mihaly wrote the NPPE on July 15, 2002, and failed.

[11] On June 3, 2002, APEGA reactivated his file and advised Mr. Mihaly that he was required to write three confirmatory examinations by May 2003 and the Engineering Economics course or examination by November 2003.

[12] Mr. Mihaly again sat the NPPE on January 20, 2003 and failed.

[13] On August 1, 2003, APEGA again withdrew his file because Mr. Mihaly had not written the required confirmatory examinations within the period specified by APEGA.

[14] On October 3, 2006, Mr. Mihaly asked APEGA to reactivate his application for a third time.

[15] On October 18, 2006, APEGA advised Mr. Mihaly that they had reactivated his file and given the passage of time, APEGA requested from him an updated resume and a list of updated references. Mr. Mihaly provided this information on November 16, 2006.

[16] On August 10, 2007, the Board of Examiners reconsidered Mr. Mihaly's application and again determined that Mr. Mihaly had to complete three confirmatory examinations plus a course or examination in Engineering Economics, or the Fundamentals of Engineering Examination (FE Exam). The Board also determined that Mr. Mihaly had not acquired the required one year of Canadian professional engineering experience in the position where he had worked because it was not at a D level. He was therefore required to obtain one-year acceptable D level Canadian engineering experience.

[17] Mr. Mihaly did not write the required examinations. On August 5, 2008, he filed a complaint with the Alberta Human Rights Commission, pursuant to the *Alberta Human Rights Act*, RSA 2000, c A-25.5 [*AHRA*], alleging that APEGA discriminated against him based on his place of origin when it denied him registration as a professional engineer.

[18] On February 6, 2014, the Tribunal found that "Mr. Mihaly has succeeded in establishing that the *Examination Standard* and the *Experience Standard* used by [APEGA] to assess his educational credentials, without more individualized assessment or exploration of other options, constitutes discrimination which cannot be justified under the [*AHRA*]: Tribunal Decision, at para 242. The Tribunal awarded Mr. Mihaly $10,000 in general damages. The Tribunal further ordered APEGA to reconsider Mr. Mihaly's application. The order included detailed provisions requiring APEGA to appoint a committee to assess and apply "individual assessment options to Mr. Mihaly with a view to correcting any perceived academic deficiencies." The committee and APEGA were directed to consider and provide options and support, including possible examination exemptions combined with different methods of assessment, the provision of programs or courses, matching Mr. Mihaly with a mentor to guide him in integrating into the engineering profession, and directing Mr. Mihaly to networking and language training resources.

[19] The Tribunal declined to award lost wages to Mr. Mihaly, because "there are too many uncertainties involved in the licensure and then employment of Mr. Mihaly to find that there was a causal connection between the discrimination and any loss of wages. Also, Mr. Mihaly did not present any evidence in support of his claim for lost wages."

[20] This Tribunal Decision is under appeal and cross-appeal by APEGA and Mr. Mihaly respectively.

APEGA's Legislative Framework

[21] APEGA regulates the practice of engineering and geoscience in Alberta pursuant to the *Engineering and Geoscience Professions Act* [*EGPA*] and the *Engineering and Geoscience Professions General Regulation*, Alta Reg 150/1999 [*EGPR*].

[22] An individual cannot practice engineering in Alberta unless they have been approved for registration pursuant to s 2 of the *EGPA*.

[23] Applications for registration as a professional member of APEGA are considered by the Board of Examiners established under s 30 of the *EGPA*.

[24] Section 15 of the *EGPR* stipulates the requirements for registration as a professional member. The applicant must: be a Canadian citizen or permanent resident of Canada; be of good character and reputation; have knowledge of the *EGPA* and the practice of engineering or geoscience as demonstrated by passing an examination prescribed by the Board of Examiners (i.e. the NPPE); be proficient in English; and possess the required academic qualifications and experience.

[25] Academic qualification may be demonstrated by graduation from an accredited institution, "a university program in engineering or geoscience or a related university program that is acceptable to the Board of Examiners": *EGPR* s 10l Alternatively, academic qualification may be demonstrated by registration as an "examination candidate" under s 8(b) of the *EGPR* and completion of required examinations under that section: *EGPR* s 10.

[26] Section 8(b) of the *EGPR* provides:

> 8. A person who meets the following requirements and applies to the Registrar for registration is entitled to be admitted as an examination candidate:
>
> ...
>
> (b) the applicant is a graduate of
>
> (i) a university program in engineering or geoscience, or
>
> (ii) a related academic program that is acceptable to the Board of Examiners,
>
> but 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.

APEGA's Registration Process

[27] Three witnesses gave evidence before the Tribunal on behalf of APEGA's registration processes, both generally and in relation to Mr. Mihaly. The following summary is drawn from the Tribunal's review of this undisputed evidence.

[28] Dr. David Lynch, as Dean of the Faculty of Engineering at the University of Alberta, held a statutory position on the Board of Examiners. Dean Lynch was also a member of the Canadian Engineering Accreditation Board (CEAB), which assesses engineering programs within and outside of Canada.

[29] Engineering programs within Canada which request accreditation by CEAB are assessed in an elaborate process, which involves review of their curriculum, faculty and facilities. Detailed material is prepared by the University and reviewed by CEAB, and an in-person inspection is held. Dr. Faulkner described the process as a quality checking, quality management and quality assurance process, with a goal to ensure that every single graduate of the program, without exception, meets every requirement for accreditation.

[30] After the visit, a report is prepared by the visiting team, responded to by the University, and reviewed by the full Accreditation Board of CEAB before a decision on accreditation is made.

[31] Canada and other countries with substantially equivalent accreditation processes for engineering programs may enter into Mutual Recognition Agreements [MRAs]. There is an extensive process under which CEAB determines whether the accreditation process is substantially equivalent to the Canadian process. Graduates of accredited programs covered by MRAs are generally not assigned examinations by APEGA. Slovakia has not applied to go through this process, and there is no MRA between Slovakia and Canada.

[32] In addition to MRAs applicable to all accredited programs within member countries, there is also a process by which particular programs may be reviewed by CEAB at the request of an institution, to determine whether the program is substantially equivalent to an accredited program in Canada. If a program is assessed as a CEAB Substantially Equivalent Program, a graduate of that program will generally not be assigned examinations by APEGA. The Slovak Technical University of Bratislava has never applied to CEAB and has not been assessed as a Substantially Equivalent Program.

[33] Engineering programs, which have not been subjected to one of the foregoing assessments, may be included on the Foreign Degree List [FD List]. This list is prepared based on a review of publically available information about the institutions. There are several thousand institutions on the FD List. Graduates of programs on the FD List are generally assigned three confirmatory examinations or the FE Exam. The FE Exam is set by the National Council of Engineering Examiners and Surveyors in the U.S. and is compulsory for all U.S graduates who wish to be licensed as professional engineers in the U.S. The current preference of APEGA is to use the FE Exam rather than other confirmatory examinations, as testing has indicated that the FE Exam provides reliable confirmation of the quality of an undergraduate engineering program.

[34] Examinations may be waived by APEGA for particular applicants if, for example, they have completed a graduate degree at a university in Canada or an MRA country, or if they have 10 years of progressively responsible engineering experience.

[35] The second witness for APEGA was Dr. Gary Faulkner, Chair of the APEGA Board of Examiners. He testified about the review of Mr. Mihaly's application.

[36] There are over 50 members on the Board of Examiners, about half of whom are academics from various disciplines within engineering and geosciences, and half of whom are experienced members within various industries. An applicant's educational qualifications are assessed by the "academic examiners" and his or her experience is assessed by the "experience examiners."

[37] Mr. Mihaly's Master's degree was assessed as equivalent to a Bachelor's degree according to the FD list and his program was found to be closer to Chemical Engineering rather

than Mechanical or Petroleum Engineering. His experience was assessed to determine whether examinations could be waived. It was determined that, although Mr. Mihaly had long experience in piping design and fabrication, it was not the type of experience which had increased in responsibility or complexity. Accordingly, Mr. Mihaly was assigned the standard confirmatory examinations. When Mr. Mihaly reactivated his application in 2006, he was given the option of confirmatory examinations or the FE Exam, as APEGA had by this time made a rule change to allow applicants to write the FE Exam instead of confirmatory examinations.

[38] The third witness for APEGA was Mr. Mark Tokarik, Deputy Registrar for APEGA. He provided further evidence regarding the application process and the review of Mr. Mihaly's application.

[39] APEGA receives about 1500 applications each year from internationally educated graduates. About 60 percent are registered with no issues and do not have to write confirmatory examinations or the FE Exam. Twenty-five percent of the applicants are assigned the FE Exam or confirmatory examinations. The remaining 15 percent have sufficient engineering experience to have examinations waived.

[40] Mr. Tokarik testified that an applicant from a university in Slovakia would first be assessed to determine if the institution is on the FD List. If it is, the applicant would be assigned the FE Exam or three confirmatory examinations. If the institution is not on the FD List, the applicant would have the option of the FE Exam or five confirmatory examinations. A larger number of confirmatory examinations are assigned as there is less knowledge about the institution. The FE Exam is considered a good measure to assess the applicant in either circumstance.

[41] Examinations may be waived if the applicant has an acceptable Masters or Ph.D. or ten or more years of acceptable work experience. Mr. Mihaly requested that his assigned examinations be waived based on his work experience, however the Board of Examiners had concluded otherwise. Mr. Tokarik advised Mr. Mihaly that if he thought the Board had made a mistake, he should submit a reconsideration request with updated information to APEGA. Mr. Mihaly was sent a reconsideration and appeal sheet. He did not submit a reconsideration request.

Procedure on the Appeal

[42] APEGA filed its appeal brief on November 20, 2014, and the Respondent Mihaly, who is self-represented, filed a response statement the same day. The Alberta Human Rights Tribunal filed limited submissions, relating to the standard of review, on November 28, 2014. The Law Society of Alberta filed a brief as Intervener on November 21, 2014. Briefs on the cross-appeal were filed by the Cross-Appellant Mihaly and the Cross-Respondent APEGA only.

[43] The Appeal was initially set for hearing on December 12, 2014. The hearing did not proceed on that day, as the Court indicated that it wished to receive submissions on behalf of the Respondent on legal issues raised by the Appellant. Recognizing that there are circumstances in which it may be appropriate in the interests of justice for a tribunal to make broader submissions on appeal or judicial review (***Leon's Furniture Ltd v Alberta (Information and Privacy Commissioner)***, 2011 ABCA 94, 502 AR 110), the Court requested counsel for the Tribunal to address the following legal issues:

a. the impact of this Court's decision in ***Grover v Alberta (Human Rights Commission)***, 1996 Carswell Alta 1149 (ABQB), aff'd 1999 ABCA 240;

b. the test for *prima facie* discrimination;

c. the test for the defence of a *bona fide* occupational requirement.

[44] Accordingly, the appeal hearing was adjourned. Legal submissions on these questions were filed by the Tribunal on March 19, 2015. APEGA filed a reply brief on April 10, 2015. Mr. Mihaly also filed further submissions on April 10, 2015. The Intervener declined to make further submissions.

[45] The appeal hearing proceeded on July 23 and 24, 2015.

Standards of Review

[46] In the time between the original briefs and the appeal hearing, the Supreme Court of Canada released decisions in ***Mouvement laïque québécois v Saguenay (City)***, 2015 SCC 16, 382 DLR (4th) 385 [***Saguenay***]; and ***Quebec (Commission des droits de la personne et des droits de la jeunesse) v Bombardier Inc.***, 2015 SCC 39, [2015] SCJ No 39 [***Bombardier***], and the Alberta Court of Appeal issued its decision in ***Stewart v Elk Valley Coal Corporation***, 2015 ABCA 225, [2015] AJ No 728 [***Stewart***]. The parties addressed these decisions in oral submissions.

[47] With the release of ***Saguenay***, ***Bombardier*** and ***Stewart***, many of the previously contentious issues regarding standard of review were conceded by the parties. The governing standards of review are set out below.

[48] Questions of procedural fairness are reviewed on the basis of whether the proceedings met the level of fairness required by law: ***Wright v College and Association of Registered Nurses of Alberta (Appeals Committee)***, 2012 ABCA 267 at para 31, 355 DLR (4th) 197 [***Wright***].

[49] Questions of law concerning the interpretation of the *Alberta Human Rights Act*, RSA 2000, c A-25.5 [*AHRA*] are reviewed for reasonableness, unless they are "of central importance to the legal system and fall outside the adjudicator's specialized area of expertise": ***Saguenay*** at paras 46-48.

[50] The test for *prima facie* discrimination is reviewed on the correctness standard: ***Stewart*** at paras 47, 56-57, citing ***Saguenay*** at paras 46-48.

[51] A lack of evidence in the record to support a Tribunal's decision is reviewed on the reasonableness standard: ***Bombardier*** at paras 70-73. This issue encompasses findings of fact based on (a) no evidence, (b) irrelevant evidence, (c) disregard for relevant evidence, or (d) irrational inferences of fact.

[52] Findings of fact and questions of mixed fact and law are subject to the reasonableness standard: ***Saguenay*** at para 46, ***Stewart*** at para 58.

[53] In ***Dunsmuir v New Brunswick***, 2008 SCC 9 at para 47, [2008] 1 SCR 190 [***Dunsmuir***], the Supreme Court indicates:

> A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the

reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

Issues on the Appeal

[54] The Appellant raises the following issues:

1. Procedural fairness: Did the Tribunal breach the rules of procedural fairness when he decided issues that were not raised by or with the parties?
2. Jurisdiction: Did the Tribunal err when he held that he had jurisdiction to determine whether discrimination based on the place a person receives their education constitutes discrimination based on place of origin?
3. *Prima face* discrimination: Did the Tribunal rely on the correct legal test, and reasonably apply that test, to determine whether Mr. Mihaly had demonstrated *prima facie* discrimination?
4. Justification: Was the Tribunal's decision that APEGA's registration requirements were unjustified unreasonable?

Procedural Fairness

[55] In the context of considering whether the APEGA requirements were justified under s 11 of the *AHRA*, the Tribunal concluded that examinations assigned by APEGA were not "for the purpose of correcting a perceived academic deficiency" as "required" or "contemplated" by s 8(b)(ii) of the *EGPR*: Tribunal Decision, at paras 212, 215, 218. APEGA submits that this interpretation of the *EGPR* is incorrect as it ignores the disjunctive "or": an applicant may be assigned "confirmatory examinations **or** examinations for the purpose of correcting a perceived academic deficiency." APEGA further submits that the Tribunal breached the duty of fairness by basing his decision on grounds that the parties did not advance, and that they were not given an opportunity to address. Section 8 of the *EGPR* had not been raised by either Mr. Mihaly or the Tribunal during the hearing.

[56] In support of this argument, APEGA refers to ***Amacon Property Management Services Inc. v Dutt***, 2008 BCSC 889, 2008 CarswellBC 1423 [***Amacon***]. In that case an arbitrator found that a landlord had not breached tenancy agreements as alleged, but was liable in negligence to the tenants. The question of negligence had not been addressed at the hearing before the arbitrator. The reviewing Court observed that the duty of fairness requires that parties be given the opportunity to respond to "any new ground" of decision that arises in the process of a tribunal's consultations or considerations: ***Amacon*** at para 33, citing ***IWA, Local 2-69 v Consolidated Bathurst Packaging Ltd***, [1990] 1 SCR 282 at 339, 68 DLR (4th) 524. The Court held that the arbitrator did not act fairly when he "interpreted and applied the facts adduced by the parties to an issue that neither of the parties had raised or argued, without giving the parties notice that he was considering the issue or an opportunity to make submissions." The issue of negligence raised by the arbitrator involved "principles of law and interpretations of the evidence very different from those involved with the issues argued by counsel... [and he] should have

offered each side an opportunity to be heard on the point before he reached an independent conclusion": ***Amacon*** at para 361

[57] The principle relied on in ***Amacon*** applies only to new "grounds" for decision. Tribunals, or courts for that matter, are not required to give parties an opportunity to be heard regarding every point of law that they refer to in deciding a case. In this case, the grounds of the case addressed during the hearing and the grounds of the Tribunal's decision were the same – that APEGA's standards constituted *prima facie* discrimination and were not justified under s 11 of the *AHRA*. The Tribunal's reference to s 8 of the *EGPR* was part of the reasoning leading to his conclusion that *prima facie* discrimination had not been justified.

[58] This case is more like ***Pope & Talbot Ltd v British Columbia***, 2009 BCSC 1715, 2009 CarswellBC 3389 [***Pope***] than ***Amacon***. My conclusion on this issue echoes the language in ***Pope*** at para 105:

> While it would have been prudent for the [Tribunal] to question [or put its interpretation of section 8 of the *EGPR* to] the parties about this issue, I do not consider [his] failure to do so to constitute a breach of the rules of procedural fairness in the circumstances here, particularly given the overall basis of the [Tribunal's] decision. This is not a case where [APEGA] did not have an opportunity to respond to all of the evidence and submissions that were made.
>
> Citing, ***CEP Union of Canada v Power Engineers***, 2001 BCCA 743, 97 BCLR (3d) 11.

[59] I conclude that the Appellant has not established a breach of the rules of procedural fairness.

Jurisdiction

[60] APEGA submitted that the Tribunal had no jurisdiction over Mr. Mihaly's complaint because the *AHRA* does not protect against discrimination based upon the "place of origin of academic qualifications", as found by Veit J in ***Grover v Alberta (Human Rights Human Rights Commission)***, (1997) AJ No 88 (Alta QB), aff'd 1999 ABCA 240 [***Grover***].

[61] Dr. Grover alleged discrimination on the basis of place of origin against Canadian-trained PhDs, as compared to United States-trained PhDs, at the University of Alberta. The Human Rights Commission declined to hold a hearing. Dr. Grover asked the Court to quash the Commission's decision, arguing that "place of origin" did not mean "place of birth" but "where you came from."

[62] Veit J denied the application, holding at paras 47-48:

> 47 ...Dr. Grover asserts that, in any event, "place of origin" does not mean "place of birth" but means "where you came from" which does not necessarily mean place of birth. Also, she claims that "place of origin" must look to the element of origin which is key to the employer and that in this case, the key issue for the employer is the place where prospective faculty members obtained their Ph.D. qualification...:
>
> 48 ...I cannot accept this argument. The decisions cited in support of Dr. Grover's argument are not persuasive... The statute with which we are concerned does not use the phrase "place of origin" in a vacuum; on the contrary, it enumerates the

> ground as "place of origin of the person." This degree of specificity prevents the broad interpretation advocated by Dr. Grover. It is not for the courts to impose an artificial interpretation of words chosen by the Legislature. ... The court must give a fair, liberal, but faithful interpretation to the phrase "place of origin." That phrase – place of origin of a person – cannot be stretched to include the place where the person received their Ph.D. degree.

[63] Veit J's decision was upheld, however the Court of Appeal expressly declined to comment on the jurisdictional question: ***Grover v Alberta Human Rights Commission***, 1999 ABCA 240 at para 11, 237 AR 370.

[64] The Tribunal dismissed the jurisdictional argument:

> [48] In [*Bitonti v British Columbia (Ministry of Health)*, [1999] BCHRTD No 60], the Tribunal considered a complaint brought by graduates of foreign medical schools who were alleging that the system of training and licensing medical practitioners in British Columbia discriminated against graduates of medical schools of certain countries outside North America. The Tribunal concluded that while "place of origin" does not include place of medical training *per se,* its interpretation is broader than simply place of birth. The Tribunal concluded, after considering the relationship between place of medical training, country of birth and the College's licensing rules that the College had discriminated against certain foreign-trained physicians based on their place of origin.
>
> [49] With respect, I am more inclined to the reasoning of that in *Bitonti, supra* and find the *Grover, supra* case must be limited to its unique facts and argument. In *Grover,* the complainant was born in Holland and had moved to Canada when she was two years old and had obtained her doctorate degree from the University of Toronto. She was arguing that the University's hiring policy favoured American PhDs, undercutting Canadian PhDs. The context and the facts of *Grover* were different from what we are considering in this case. In this matter before me, unlike in *Grover*, there is a clear linkage between Mr. Mihaly's place of origin, the origin of Mr. Mihaly's foreign credentials and whether he is granted admission to [APEGA]. The protected ground of place of origin, in these particular facts, is broad enough to include any adverse treatment related to his foreign credentials.

[65] APEGA submits that Veit J did not confine her decision to the facts before the Court, that ***Grover*** clearly stands for the proposition that "place of origin" does not encompass place of education; and that the Tribunal was bound to follow that definition outlined by the Court of Queen's Bench. Thus, the Tribunal incorrectly concluded that it had jurisdiction to adjudicate Mr. Mihaly's complaint.

[66] In my view, this issue is properly determined by the legal test for *prima facie* discrimination. Thus, the applicable standard of review is correctness: ***Stewart*** at paras 47, 57.

[67] Mr. Mihaly alleges adverse effect discrimination based on his place of origin. The test to demonstrate *prima facie* discrimination in this context has undergone development since ***Grover*** was decided almost two decades ago. The test is set out in ***Moore v British Columbia (Education)***, 2012 SCC 61 at para 33, [2012] 3 SCR 360 [***Moore***]. Establishing a *prima facie*

case of adverse effect discrimination requires complainants to show that they have a characteristic that is protected from discrimination; that they experienced an adverse impact; and that the protected characteristic was a factor in the adverse impact. As I will discuss later, the parties have different views as to whether the ***Moore*** test includes consideration of arbitrariness or stereotypical thinking in determining whether a *prima facie* case of discrimination has been made out.

[68] The ***Moore*** test, whether or not it includes consideration of arbitrariness or stereotyping, does **not** require that "place of origin" be interpreted as including "place of education." Discrimination is not limited to rules or practices that are directly based on the listed grounds in the *AHRA*. Discrimination will also occur where a neutral rule or practice has an adverse impact and the listed ground of discrimination (i.e., place of origin) is a factor in that adverse impact. It is clear that the Tribunal had jurisdiction to apply the correct legal test and to determine whether Mr. Mihaly successfully made out a *prima facie* case of adverse effect discrimination. To the extent that it may suggest otherwise, ***Grover*** is no longer good law. However, I agree with the Tribunal that ***Grover*** was intended to be limited to its specific facts, where there was no connection between the complainant's place of origin and the place where she obtained her degree. Because of the lack of connection, adverse effect discrimination was not an issue in ***Grover***.

[69] The Appellant has not established that the Tribunal lacked jurisdiction.

Prima facie Discrimination

[70] The discrimination alleged by Mr. Mihaly against APEGA falls under the provision of the *AHRA*, s 4, which reads:

> No person shall
>
> ...
>
> (b) *discriminate* against any person or class of persons *with respect to any* goods, *services*, accommodation or facilities *that are customarily available to the public*,
>
> because of the race, religious beliefs, colour, gender, gender identity, gender expression, physical disability, mental disability, ancestry, place of origin, marital status, source of income, family status or sexual orientation of that person or class of persons or of any other person or class of persons [*Emphasis added*].

[71] The Tribunal found that APEGA provides services that are customarily available to the public, pursuant to section 4, and that the professional body is an "occupational association," that is defined in the *AHRA*, s 44(1)(j) as "an organization other than a trade union or employers' organization in which membership is a prerequisite to carrying on any trade, occupation or profession." These findings by the Tribunal are not in dispute on this appeal.

[72] The complainant has the onus to establish a *prima facie* case of discrimination: ***Wright*** at para 104.

[73] Under the ***Moore*** test, establishing a *prima facie* case of adverse effect discrimination requires complainants to show that they have a characteristic that is protected from discrimination; that they experienced an adverse impact; and that the protected characteristic was

a factor in the adverse impact. In their briefs APEGA argued that the ***Moore*** test is not comprehensive, and that a finding of *prima facie* discrimination also requires a complainant to demonstrate that the adverse impact was based on arbitrary or stereotypical treatment that is an affront to human dignity. The Commission, in response to the Court's questions, submitted that arbitrariness and stereotyping play no role in the ***Moore*** analysis.

[74] Subsequent to the filing of the parties' briefs, the Alberta Court of Appeal considered this issue in ***Stewart***. The majority decision accepted that the three-part ***Moore*** test is the correct legal test, and that it would be an error to import into the test "a condition that the discrimination be *based* on arbitrariness or perpetuation of historical stereotypes": ***Stewart*** at paras 6, 24-25. However, the majority found that it was not an error for the Tribunal to consider arbitrariness or stereotypical reasoning, as these remain relevant considerations: ***Stewart*** at para 6. The majority subsequently (at para 33) quoted the majority decision in ***Wright*** at para 65:

> Appellants rely on *Armstrong v British Columbia (Ministry of Health)*, 2010 BCCA 56 at para. 27, 2 BCLR (5th) 290, leave refused [2010] 2 SCR v and *Ontario (Director, Disability Support Program) v Tranchemontagne*, 2010 ONCA 593 at paras. 101-4, 102 OR (3d) 97, which conclude that *McGill University* does not add a separate requirement of stereotypical or arbitrary treatment to the test for *prima facie* discrimination. However, both of those cases (*Armstrong* at para. 24 and *Tranchemontagne* at paras. 101-4) confirm the need for a link or nexus between the protected ground or characteristic and the adverse treatment. Those cases conclude that the required link or *nexus* is incorporated into the core test for *prima facie* discrimination. The strength or proximity of that link or *nexus* is a mixed question of fact and law, and an important component in the analysis is whether the treatment is in fact stereotypical or arbitrary, and whether it affronts concepts of human dignity. Not any *nexus or* connection, no matter how remote, is sufficient.

[75] APEGA submits that the majority in ***Stewart*** has confirmed that this holding in ***Wright*** is not overtaken by the subsequent decision in ***Moore***, and that it is binding on this Court. I agree. That said, it must be kept in mind that the majority holding in both ***Wright*** and ***Stewart*** is not, as APEGA initially submitted, that arbitrariness or stereotyping is a required element of *prima facie* discrimination. That proposition was expressly rejected in ***Stewart***. Arbitrariness and stereotyping are relevant, but not required. The presence of arbitrariness and stereotyping may support a determination that the link between the protected characteristic and the adverse treatment is sufficiently strong to merit a finding that the protected characteristic was a factor in the adverse impact. But the determination of that mixed question of fact and law does not depend on the presence of arbitrary or stereotypical treatment.

[76] In considering whether a *prima facie* case of discrimination had been made out, the Tribunal held that the legal test as set out in ***Moore*** required Mr. Mihaly as complainant to show that he has a characteristic that is protected from discrimination; that he experienced an adverse impact; and that the protected characteristic was a factor in the adverse impact.

[77] The Tribunal observed that "place of origin" is a prohibited ground of discrimination and that there was no doubt that Mr. Mihaly was "treated as a foreign graduate because of the origin of his educational credentials" which, on the facts, were a "proxy for place of origin." Mr. Mihaly was adversely impacted by APEGA's requirements that he complete confirmatory

examinations or the FE Exam. "These requirements were not applied to engineering graduates from Canada or countries with which [APEGA] had MRAs" (paras 171-172).

[78] APEGA submits that Mr. Mihaly is not able to establish an adverse impact because he never wrote the confirmatory examinations or the FE Exam, and so it is unknown whether he would or would not have passed. In my view, it was reasonable for the Tribunal to conclude that having to write examinations is in itself an adverse impact. Persons required to write examinations obviously have to expend time and resources (including, but not limited to, the examination fees) in order to prepare for and write the examinations, which is a form of adverse impact independent from the issue of whether they pass the examinations.

[79] Regarding the third element of the *prima facie* test, the Tribunal found (at para 173):

> Finally, there is no doubt that the adverse impact identified above is related to Mr. Mihaly's place of origin in that his engineering qualifications were inextricably linked to his place of origin. The initial assumption by [APEGA], underlying the examination and experience requirements is that engineers with qualifications from foreign countries with which [APEGA] has no MRAs, have qualifications which are not at par with Canadian engineering accreditation standards. Foreign engineering graduates have a barrier they have to overcome before they are granted membership by [APEGA].

[80] The Tribunal noted that the ***Moore*** test required only that a complainant show that "place of origin" was a "factor" in the adverse impact. However, counsel for APEGA had argued that differential treatment could be discriminatory only if it were based upon stereotypical and arbitrary criteria that perpetuated disadvantage. The Tribunal reviewed the case law on this point, as it stood at the time, and concluded that, while there was some lack of clarity in the jurisprudence, the direction in Supreme Court of Canada decisions did "not seem to support that stereotyping or stigma must be shown, particularly at the *prima facie* stage of the discrimination analysis" (at para 175).

[81] The Tribunal went on to find that the APEGA requirements did perpetuate disadvantage, and thus constitute substantive discrimination (at para 180):

> In any event, I do find that certain requirements for licensure made of Mr. Mihaly perpetuated disadvantage thus constituting substantive discrimination. In the case at hand, many Eastern European and immigrants from Africa and Asia to Canada do experience disadvantage and discrimination in the workforce because of language, culture and racial prejudice. The imposition of additional exams or requirements without appropriate individualized assessment (to be more fully discussed later) or the necessary flexibility, restricts the ability of immigrants to work in their respective professions and continues to perpetuate disadvantage in these groups. Instead of working in their profession, these immigrants are forced to take lower paying jobs in other fields. While I understand the imposition of policies to ensure competency and safety in professional fields may be necessary, the nature of certain policies imposed by [APEGA] on immigrants such as Mr. Mihaly with foreign credentials, appear too restrictive and categorizes immigrants, not based on individual assessment, but rather on country from which qualifications were received. In Mr. Mihaly's specific case, the requirements to

> pass the confirmatory exams, the FE and the NPPE exams and possess one year Canadian experience, do perpetuate disadvantage.

[82] As indicated earlier, it is common ground that the standard of review regarding the Tribunal's selection of the appropriate legal test to demonstrate *prima facie* discrimination is correctness. Findings of fact and questions of mixed fact and law involved in the application of that test are subject to the reasonableness standard. A lack of evidence in the record to support a Tribunal's decision is also reviewed on the reasonableness standard.

[83] I do not discern an error in the Tribunal's statement of the legal test. The ***Moore*** test is the applicable test. Arbitrariness and stereotyping are relevant but not required elements in assessing the connection between a ground of discrimination and an adverse impact. The Tribunal did not suggest that arbitrariness or stereotyping were irrelevant; in fact, he found that discriminatory assumptions underlay APEGA's policies regarding internationally educated graduates. The issue is not regarding the selection of the correct legal test, but its application. Thus the reasonableness standard of review applies.

[84] APEGA challenges the Tribunal's finding that APEGA's policies were based on discriminatory assumptions. The Tribunal's finding that APEGA assumed that "engineers with qualifications from foreign countries with which [APEGA] has no MRAs, have qualifications which are not at par with Canadian engineering accreditation standards" was not supported by any evidence. On the contrary, APEGA asserts that the totality of the evidence demonstrated that APEGA makes no assumptions about the qualifications of any institutions' graduates, Canadian or otherwise, until the institution has satisfied APEGA, through the knowledge-based CEAB accreditation process or a substantially similar process, that its graduates meet the required academic standard.

[85] I agree that the Tribunal's finding that APEGA's policies are based on discriminatory assumptions is not supported by the evidence. The evidence cited by the Tribunal described the complex and comprehensive systems involved in accrediting Canadian engineering programs, and in assessing whether other programs are substantially equivalent to those programs on either a country-wide (MRA) or institutional basis. Determining whether a program is accredited or equivalent is an endeavour that involves cooperation between accrediting organizations and educational institutions, and a significant investment of resources by both.

[86] The evidence cited by the Tribunal was clear that the distinction between accredited or equivalent programs and other programs is not based on assumptions, but on knowledge about the programs. When APEGA 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.

[87] A similar situation regarding dental education was considered by the Ontario Human Rights Tribunal in ***Fazli v National Dental Examining Board of Canada***, 2014 HRTO 1326 [***Fazli***]. The Dental Board's accreditation system applied different certification processes for graduates of accredited and non-accredited dental programs. The Ontario tribunal observed that, if more onerous certification requirements were imposed "based on negative assumptions about an individual's place of training, it may be appropriate to find discrimination based on place of origin": at para 39. But it held that this was not the case before it (para 40):

> [T]he evidence does not establish that the respondent imposed more onerous certification requirements on the applicant based on any assumptions about Afghanistan or any other countries. On the contrary, the evidence clearly establishes [that] the respondent's differential treatment of graduates from accredited programs is based on actual knowledge about the programs garnered through a sophisticated and ongoing process of evaluation of the program. This is not discriminatory. In *Jamorski v. Ontario (Minister of Health)*, (1988), 64 OR (2d) 161 at para. 20 [*Jamorski*], the Ontario Court of Appeal explicitly rejected a claim that distinguishing between graduates of accredited and non-accredited medical schools was discriminatory, stating in part:
>
> > No one has argued that the practice of medicine or medical education should be unregulated. The protection of the public demands that so essential a public service should be carefully regulated to ensure that only qualified persons are entitled to practise medicine. The appellants are the graduates of a system of medical education which is simply not known to, or monitored by, the Ontario authorities. It would be quite unrealistic to expect the graduates of such an unknown system to be treated in the same way as graduates of systems of medical education which have been carefully assessed and accredited.

[88] The Tribunal, in the Decision under appeal, made no reference to the evidence when he found that APEGA's policies were based on discriminatory assumptions. He offered no line of reasoning that would explain his finding. While the Tribunal's findings of fact or mixed fact and law merit deference, in this case, the absence of any consideration of the evidence and the absence of reasons leads me to the conclusion that this finding by the Tribunal is unreasonable.

[89] That, however, is not the end of the issue, as the correct legal test does not require that Mr. Mihaly demonstrate arbitrariness or stereotypical treatment; these are relevant but not required considerations. The real issue is whether Mr. Mihaly's place of origin was a factor in the adverse impact that he suffered.

[90] I am unable to defer to the Tribunal's determination on this point, as it was based in part on an unreasonable finding.

[91] Mr. Mihaly was born, grew up and was educated in the former Czechoslovakia, including his post-secondary education in engineering. When he eventually immigrated to Canada, he came with this background. The Tribunal found that Mr. Mihaly's engineering qualifications were "inextricably linked to his place of origin". Is that factual finding, which is not disputed, sufficient to find that his place of origin was a "factor" in the adverse impact experienced by Mr. Mihaly?

[92] APEGA submits it is not, citing a number of cases in which "human rights tribunals and courts have held that the assessment of regulated professionals knowledge and skills and the equivalency of foreign degree programs does not amount to *prima facie* discrimination."

[93] The cases cited by APEGA are not helpful, because they either do not apply the correct legal test or are distinguishable on the facts.

[94] ***Fazli*** found that discrimination was not established because stereotyping or arbitrary treatment was not shown. That is not the test under ***Moore*** as interpreted in ***Stewart***.

[95] Some cases relied on by APEGA were brought under the *Canadian Charter of Rights and Freedoms* and were dismissed based on legal principles that are not applicable here: ***Jamorksi***; ***Taylor v Institute of Chartered Accountants (Saskatchewan)***, 1989 CarswellSask 429, 59 DLR (4th) 656 (Sask CA); and ***Veale v Law Society (Alberta)***, 2001 ABQB 923, 304 AR 314, aff'd 2002 ABCA 258.

[96] APEGA also cites: ***Gersten v College of Physicians and Surgeons of Alberta***, 2004 AHRC 16 [***Gersten***]; ***Agduma-Silongan v University of British Columbia***, 2003 BCHRT 22 [***Agduma-Silongan***]; ***Keita v Qualification Evaluation Council of Ontario,*** 2014 HRTO 1039 [***Keita***] and ***Abi-Mansour v Chief Executive Officer of Passport Canada***, 2014 PPSST 12 [***Abi-Mansour***]. In all of these cases, the tribunals or courts found that, on the facts, the treatment complained of was not related to the complainant's place of education, but due to other factors, such as not having previously obtained specialist certification (***Gersten***), or the specifics of the complainant's program of study (***Agduma-Silongan***) or grades (***Keita***), or other factors considered in an internal appointment process (***Abi-Mansour***).

[97] *Prima facie* discrimination was found (and found not to be justified) in ***Bitonti***. Foreign-trained doctors complained that they were subjected to adverse effect discrimination based on national origin by a College of Physicians and Surgeons rule which distinguished between two categories of physicians: "Category I" included graduates of medical schools in Canada, the United States, Great Britain, Ireland, Australia, New Zealand or South Africa; "Category II" included graduates of medical schools anywhere else in the world.

[98] In ***Bitonti*** the complainants provided statistical evidence that there was a high degree of correlation between place of origin and place of education. The expert evidence was that:

> [It] can be concluded that a very high degree of correlation exists between place of origin and place of education among Category I and II countries. There are very few exceptions to the rule that place of medical education generally equals place of origin among the developed nations.

[99] The Tribunal accordingly found that the College rule which distinguished between medical graduates based on their place of medical education, distinguished in its effect between graduates based on their place of origin.

[100] There was no statistical evidence in this case connecting place of engineering education and place of origin. However, there is no dispute regarding the Tribunal's finding that Mr. Mihaly's place of education was "inextricably linked" to his place of origin. Mr. Mihaly was born, grew up and was educated in his place of origin. When he immigrated to Canada, he came with his educational background, in the same way that he came with his culture and language.

[101] An analogy may be drawn to discrimination based on language. In ***Liu v Everlink Services Inc.***, 2014 HRTO 202 at paras 87-90, the Human Rights Tribunal found that the complainant was dismissed from his job due to perceived language difficulties. Language is not a protected characteristic, but the Tribunal found that there was a sufficient nexus between the complainant's language difficulties and his place of origin to establish *prima facie* discrimination.

[102] Mr. Mihaly's circumstances are very different from the complainants considered in ***Stewart*** and ***Wright***, who had a protected characteristic (substance addiction, a form of disability), but were disciplined by their employers for breach of employment policies. The connection between breach of the policies and disability was found to be too remote to base a complaint of discrimination. The tribunals and reviewing courts concluded that the complainants had options: they *could* have complied with the employment policies despite their addictions, and thus avoided the alleged adverse impact of discipline.

[103] Mr. Mihaly had no such options, no way of avoiding the adverse impact of having to write confirmatory examinations or the FE Exam, aside from leaving his place of origin to pursue his education. 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.

[104] It is important to be clear about the scope of this finding of *prima facie* discrimination. When the Tribunal applied the ***Moore*** test he found that Mr. Mihaly was adversely impacted by being required to complete confirmatory examinations or the FE Exam, and that *this* adverse impact was related to his place of origin (paras 171-173). However, when the Tribunal found that APEGA's requirements perpetuated disadvantage and constituted substantive discrimination, he found that "[i]n Mr. Mihaly's specific case, the requirements to pass the confirmatory exams, the FE and the NPPE exams and possess one year Canadian experience, do perpetuate disadvantage" (para 180).

[105] The Tribunal's finding of "substantive discrimination" in relation to the third branch of the ***Moore*** test may be relevant, but it is not sufficient to establish discrimination. It is also necessary to demonstrate an adverse impact and that a prohibited ground of discrimination is a factor in relation to the adverse impact. These elements of the ***Moore*** test were never addressed by the Tribunal in relation to the NPPE or the Canadian experience requirement. Further, the evidence does not demonstrate that Mr. Mihaly's national origin was a factor in relation to any disadvantage that he may have experienced as a result of these requirements.

[106] There was no finding, and no basis for a finding, that the requirement to pass the NPPE constituted adverse impact discrimination. The NPPE is required of *all* applicants, wherever they were educated. While there was evidence that Mr. Mihaly failed this examination three times, there was no evidence that this was in any way related to his place of origin. There was, for example, no evidence that the requirement to take the NPPE disproportionately excludes foreign engineering graduates from registration with APEGA.

[107] APEGA requires that registered professional engineers must have four years' experience, one year of which must be in Canada. The purpose of the Canadian experience requirement is the "need for applicants to be able to understand Canadian codes and the way engineering is practiced amongst a team of individuals, which may include more than engineers" (Tribunal Decision at para 236). Engineers who immigrate to Canada are "free to commence working as an engineer on arrival and to start accumulating the one year required Canadian experience", provided that they work under the supervision of a licensed professional engineer (*Ibid*).

[108] There was no finding and no evidence that this requirement had an adverse impact on Mr. Mihaly based on his national origin. Mr. Mihaly testified that he had difficulty finding a job without being registered as a professional engineer, and that engineering firms "usually refuse to

hire engineers with more than six years' experience in junior positions" (*Ibid* at para 237). The Tribunal cited this evidence but did not make a finding that Mr. Mihaly's difficulties in finding employment were related to his national origin. In fact, when considering Mr. Mihaly's damages claim, the Tribunal held that there were "too many uncertainties involved in the licensure and then employment of Mr. Mihaly to find that there was a causal connection between the discrimination and any loss of wages" (*Ibid* at para 248).

[109] The Tribunal failed to apply the ***Moore*** test in relation to the NPPE and Canadian experience requirements. This failure to even consider required elements of the legal test, and the lack of any evidence to support a finding that those elements were present, renders the Tribunal's apparent finding of *prima facie* discrimination in relation to the NPPE and the Canadian experience requirement unreasonable: ***Canada (Director of Investigation and Research) v Southam Inc.***, [1997] 1 SCR 748 at para 39, 144 DLR (4th) 1, cited in ***Housen v Nikolaisen***, 2002 SCC 33 at para 27, 286 NR 1.

Justification

[110] Section 11 of the *AHRA*, provides that "[a] contravention of this Act shall be deemed not to have occurred if the person who is alleged to have contravened the Act shows that the alleged contravention was reasonable and justifiable in the circumstances."

[111] The onus is on the respondent (discriminating party) to establish the "reasonable and justifiable" defence: ***Wright*** at paras 127-29, citing, ***British Columbia (Public Service Employee Relations Commission) v BCGEU***, [1999] 3 SCR 3 at para 54, 176 DLR (4th) 1 [***Meiorin***], and ***British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)***, [1999] 3 SCR 868 at para 20, 181 DLR (4th) 385 [***Grismer***].

[112] There is no dispute that the Tribunal applied the correct legal test of justification, as set out in ***Meiorin*** at para 54 and ***Grismer*** at para 20. To establish justification, the test requires the defendant to prove that:

> (1) it adopted the standard for a purpose or goal that is rationally connected to the function being performed;
>
> (2) it adopted the standard in good faith, in the belief that it is necessary for the fulfillment of the purpose or goal; and
>
> (3) 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.

[113] No issue is taken with the Tribunal's application of the test in relation to the first two elements of the test. The Tribunal found that APEGA "has the statutory responsibility for the registration of international engineers to assure itself of their competency to practice in Alberta without causing harm to the public." The standards applied by APEGA are "adopted for safety and competency reasons." The standards are rationally connected to APEGA's function and were adopted in good faith (at paras 191-192).

[114] The issue on this appeal relates to the Tribunal's finding that APEGA did not reasonably accommodate Mr. Mihaly. The standard of review is reasonableness.

[115] The Supreme Court of Canada provided guidance to the application of the third branch of the ***Meiorin*** test in ***Hydro-Québec v Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ)***, 2008 SCC 43 at para 16, [2008] 2 SCR 561 [***Hydro-Québec***]:

> The test is not whether it was impossible for the employer to accommodate the employee's characteristics. The employer does not have a duty to change working conditions in a fundamental way, but does have a duty, if it can do so without undue hardship, to arrange the employee's workplace or duties to enable the employee to do his or her work.

[116] The Supreme Court in ***Meiorin*** at para 65, outlined the following questions that may be asked in the course of the analysis:

> (a) Has the employer investigated alternative approaches that do not have a discriminatory effect, such as individual testing against a more individually sensitive standard?
>
> (b) If alternative standards were investigated and found to be capable of fulfilling the employer's purpose, why were they not implemented?
>
> (c) Is it necessary to have all employees meet the single standard for the employer to accomplish its legitimate purpose or could standards reflective of group or individual differences and capabilities be established?
>
> (d) Is there a way to do the job that is less discriminatory while still accomplishing the employer's legitimate purpose?
>
> (e) Is the standard properly designed to ensure that the desired qualification is met without placing an undue burden on those to whom the standard applies?
>
> (f) Have other parties who are obliged to assist in the search for possible accommodation fulfilled their roles? [*Emphasis in original*].

[117] The scope of *prima facie* discrimination is important here. The Tribunal found that APEGA did not reasonably accommodate Mr. Mihaly, not only in relation to the requirement that he write confirmatory examinations or the FE Exam, but also in relation to the requirements to write the NPPE and to complete one year of Canadian experience before being certified. Justification under s 11 of the *AHRA* is required *only* in relation to conduct which has been found to constitute *prima facie* discrimination. Thus, the Tribunal's findings that the NPPE and Canadian experience requirements were unjustified were clearly outside his role under s 11, and unreasonable.

[118] The requirement to write confirmatory examinations or the FE Exam is *prima facie* discriminatory, and thus, must be justified under s 11. The Tribunal found that this requirement was not justifiable on two grounds:

- that Mr. Mihaly should not have been required to write confirmatory examinations or the FE Exam, but only examinations to correct perceived academic deficiencies following an individualized assessment of his credentials;
- that Mr. Mihaly should not have been required to write a standardized "one size fits all" examination, rather than being individually assessed.

[119] The former finding by the Tribunal arose from his finding that the examinations assigned by APEGA were not "for the purpose of correcting a perceived academic deficiency" as "required" or "contemplated" by s 8 of the *EGPR*. This interpretation of the *EGPR*, which has already been discussed in relation to the procedural unfairness argument, ignored the disjunctive "or" in the section, which provides that an applicant should be registered as an "examination candidate" 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." While the Tribunal is generally entitled to deference regarding legal interpretations of the "home statute" or statutes closely connected to his function, he had no particular familiarity with the *EGPR*, and he did not seek submissions from the parties regarding the interpretation of this section. No line of reasoning was provided by the Tribunal and none was submitted by the parties on the appeal that would support an interpretation of s 8 of the *EGPR* that disregards the disjunctive "or" and gives no independent effect to the words "confirmatory examinations". The Tribunal's interpretation of the section was unreasonable. It follows that his determinations that APEGA was "required under the statute to take a curative approach" and that APEGA had not adopted the "legislative directive of 'correcting a perceived academic deficiency" were also unreasonable.

[120] The Tribunal devoted part of his decision to critiquing the process by which the FD List of engineering programs is created. This is beside the point because Mr. Mihaly actually obtained some advantage from the fact that his program was on the FD List (he was assigned three confirmatory examinations instead of five). The distinction of relevance is between engineering programs that have been accredited or found to be substantially equivalent to accredited programs, and other engineering programs.

[121] The Tribunal suggested that APEGA should "become proactive and discuss and negotiate agreements with other institutions (and to the extent it is able, other countries) from which engineers come to Canada, e.g., European Union countries." There was no evidence that APEGA has or could be expected to have the resources or ability to do this. To the contrary, the evidence of the large number of engineering programs (several thousand on the FD List), and the evidence that accreditation or assessing substantial equivalence involves complex procedures requiring cooperation and significant investments of time and resources, suggests that this endeavour would be well beyond the capacity of most professional regulatory bodies. That is no doubt one of the reasons that APEGA relies on work done by CEAB and other national and international organizations.

[122] APEGA does not assign examinations to applicants in Mr. Mihaly's circumstances based on perceived academic deficiencies. It assigns confirmatory examinations or the FE Exam in order to assess the quality of the undergraduate engineering programs undertaken by them. APEGA lacks reliable evidence about the engineering programs, and therefore has to assess competence of the graduates in other ways, whether through completion of post-graduate studies, suitable experience, or confirmatory examinations.

[123] APEGA's policy of assigning confirmatory examinations where competence has not been otherwise established is consistent with the *EGPR*, and consistent with its objective of ensuring the competency of professional engineers.

[124] The Tribunal addressed his concern regarding standardized examinations as follows (para 211):

> The problem with requiring the FE exam for all examination candidates is that it is a one size fits all approach without taking into account an individual's background, specific training and experience. This expectation of foreign engineers to pass the FE exam without taking into consideration their actual knowledge and experience is very similar to what was expected of the claimant, Tawney Meiorin, in ***Meiorin***, *supra*, who as a female fire fighter had performed well as a firefighter but was laid off because she could not run 2.5 km in 11 minutes after new standards were introduced for fire fighters. Foreign engineering graduates similarly, are expected by [APEGA] to "run 2.5 km in 11 minutes" like all Canadian engineering graduates because they are being tested on the Accreditation Standard, notwithstanding that the [internationally educated graduate] may be able to complete tasks expected of engineers with reasonable safety and competency.

[125] This analysis by the Tribunal essentially finds the FE Exam to be unreasonable because it is standardized. The Tribunal cites ***Meiorin*** in support of this approach without considering the differences between the aerobic standard at issue in that case, or the reasons of the Supreme Court of Canada for finding that standard to be unreasonable. The Tribunal's reliance on ***Meiorin*** is, in my view, deeply flawed.

[126] The aerobic standard at issue in ***Meiorin*** was unreasonable because:

- A disproportionate number of women were unable to meet the high aerobic standard imposed, because of their generally lower aerobic capacity: ***Meiorin*** at para 69;
- Passing the standard was not shown to be reasonably necessary to the safe and efficient performance of the work of a forest firefighter: ***Meiorin*** at para 73;
- The employer did not establish that it would experience undue hardship if a different standard were used: ***Meiorin*** at para 73.

[127] The FE Exam differs from the aerobic standard in ***Meiorin*** on every one of these points.

[128] The Tribunal seems to have assumed that the FE Exam would have a disproportionate impact on foreign educated applicants and tend to preclude them from being registered as professional engineers. There was no evidence to support this assumption; in fact the evidence suggests otherwise. The FE Exam has a pass rate of 85%. Persons who do not pass can retake the exam.

[129] It is, of course, unknown whether Mr. Mihaly would pass the FE Exam (or the alternative confirmatory examinations), as he never sat for any of these examinations.

[130] I agree with APEGA's submission that there was no evidence that internationally educated graduates with entry level competence would have any difficulty passing the FE Exam.

[131] The Tribunal accepted that the confirmatory examinations and the FE Exam are developed to assure competency of professional engineers, and thus, public safety. Confirmatory examinations are developed by individuals at the University of Alberta and the University of Calgary. They are designed to cover the subject matter that APEGA would expect to see in someone who has graduated from a Canadian-accredited program. Had Mr. Mihaly opted to write these exams, he would have been assigned exams in chemical engineering, his area of specialization. The FE Exam is developed by the National Council of Examiners for Engineering

and Surveying together with U.S. state licensing boards. The exam is split in two sessions, with the morning session covering the common fundamentals of engineering material learned the first two years of a Canadian engineering program, and the afternoon session covering the type of material that a Canadian student would learn in the third and fourth year in their field of specialization. The FE Exam is offered in six disciplines, including chemical engineering.

[132] The evidence was that these examinations test knowledge that all graduates of accredited engineering programs are expected to possess. This is very different from the aerobic standard in ***Meiorin***, where the Supreme Court of Canada observed that those standards were developed without ascertaining that they were necessary for safe and efficient performance as a firefighter. There were no similar criticisms of the development of the confirmatory examinations or the FE Exam, which were developed by experts in the field to test the knowledge expected of graduates of accredited engineering programs.

[133] The Tribunal accepted that the FE Exam "parallels the Canadian Accreditation standard" By taking it, internationally educated graduates "are expected to demonstrate that their education is at par with a Canadian graduate": Tribunal Decision at para 210.

[134] Despite this, the Tribunal went on to hold in the following paragraph that "[f]oreign engineering graduates ... are expected by [APEGA] to 'run 2.5 km in 11 minutes' like all Canadian engineering graduates ... notwithstanding that the [internationally educated graduate] may be able to complete tasks expected of engineers with reasonable safety and competency."

[135] The Tribunal's comment is simply untenable. Foreign engineering graduates are not expected to "run 2.5 km in 11 minutes," they are expected to possess the knowledge that is the basis of their profession, as demonstrated by entry level competence on a par with graduates of accredited engineering programs. The aerobic standard in ***Meiorin*** was not shown to be reasonably necessary to safe and efficient performance as a firefighter. But possession of entry level engineering competence is, obviously, reasonably necessary to safe practice as a professional engineer.

[136] Other tribunals which have applied ***Meiorin*** have found that professional regulators are justified in assessing credentials through examinations.

[137] In ***Caliao v College of Nurses of Ontario***, 2011 CanLII 90733 at paras 37-39 (ON HPARB), an applicant who had completed her nursing education in the Philippines failed to pass the Canadian Registered Nurse Examination after three attempts. Successful completion of the examination was a requirement for registration with the College. The Health Professions Appeal and Review Board applied the ***Meiorin*** test, and concluded that "[g]iven the College's duty to serve and protect the public interest, and to establish and maintain standards of qualifications for persons to be issued certificates of registration, the Board is satisfied that a regulatory requirement that applicants have no more than three opportunities to demonstrate that they meet baseline competencies through standard testing, to be reasonable and *bona fide*": at paras 37-39.

[138] In ***LPG v College of Audiogists and Speech Language Pathologist of Ontario***, 2009 CanLII 92443 at paras 66-67, 70 (ON HPARB) [***LPG***], the Ontario Health Professions Appeal and Review Board found that a requirement for language proficiency was rationally connected to the practice of the profession of audiology and speech language pathology, and that testing language proficiency by means of standardized tests was reasonable:

> 66. When the College registers an applicant, it is certifying to the public and other members of the profession that the registrant meets professional standards. As the Board noted in the *Kaleem* and *Elyasi* decisions, the College has a right (and arguably an obligation) to seek objective assurance that an applicant seeking registration with the College meets professional standards when it is certifying to the public and other members of the profession that a member meets the standards expected of the profession.
>
> ...
>
> 70. Standardized tests are widely used in the professional regulatory environment to provide an objective assessment of qualifications, skills, knowledge and other matters, including language proficiency. As noted by the College, requiring applicants to demonstrate fluency by way of standardized, widely used and recognized tests helps ensure that the process of determining fluency is independent, objective, transparent, fair and impartial. Individual testing would be costly and inefficient such that it would impose undue hardship on the College, and in the Board's view would not provide a consistent, standardized and objective evaluation as offered by the TOEFL and the IELTS in terms of whether an applicant meets the fluency standard expected of the profession.

[139] The last paragraph above raises the issue of individualized testing. The Supreme Court in ***Meiorin*** stated that the possibility of individual testing against an individually sensitive standard is one factor that should be considered in the analysis of whether an employer could accommodate an employee without incurring undue hardship. Ms. Meiorin had been previously employed as a firefighter before she was fired for failing to meet the new standard. She had performed her duties satisfactorily. These circumstances lent credence to the suggestion that the employer could determine her competency in an individual assessment.

[140] APEGA individually assesses applicants to determine whether examinations may be waived. Examinations may be waived for applicants who have completed a graduate degree at a university in Canada or an MRA country, or if they have ten years of progressively responsible engineering experience. Mr. Mihaly did not meet either of these requirements. He took issue with APEGA's assessment of his engineering experience, but he did not pursue an internal appeal of that decision and did not present evidence before the Tribunal to demonstrate that APEGA's decision was incorrect.

[141] The Tribunal held that this individualized assessment was "on very narrow grounds" and was "quite difficult for most foreign engineers because when they come to Canada they usually come early in their careers". This finding was not supported by the evidence. Mr. Mihaly himself had considerably more than ten years' experience; it was the quality of the experience that was found to be insufficient. As to other applicants, the evidence was that of 1500 applications a year from internationally educated graduates, 60 percent are registered with no issues, 25 percent are assigned the FE Exam or confirmatory examinations, and 15 percent have sufficient engineering experience to have examinations waived.

[142] Where engineering competence is not established by graduate work or experience, APEGA assigns confirmatory examinations or the FE Exam. APEGA's evidence made it clear that this is done to provide an objective assessment of the qualifications and knowledge required of a competent engineer. APEGA submits, echoing the view of the Appeal and Review Board in

LPG, that it has moved towards use of the FE Exam because this standardized test has been proven by substantial empirical testing to be a valid and reliable measure of the accreditation standard.

[143] The Tribunal held that APEGA had not demonstrated that its expectation that internationally educated graduates meet a single standard was necessary, as "through individual assessment, there may be other ways to properly assess [internationally educated graduates'] ability to practice safely and competently" (para 232).

[144] This comment has to be considered in light of the nature of individual assessment ordered by the Tribunal in relation to Mr. Mihaly. The Tribunal ordered, in part, that APEGA (at para 249):

> Within three months of the date of this decision, establish a committee that preferably includes engineers who received their qualifications in institutions and countries outside of Canada and who have successfully integrated themselves into the engineering profession, to specifically explore and investigate options to appropriately and individually assess the qualifications of Mr. Mihaly with a view to correcting any perceived academic deficiencies. These options may include exemptions from the Fundamentals of Engineering exam or the NPPE combined with the implementation of a different form of assessment, such as some type of assistance and guidance to progress gradually in the engineering profession. Other explorations could include a possible collaboration of [APEGA] with Alberta's post secondary institutions in terms of offering programs or courses which could be offered to foreign trained engineers to correct any perceived academic deficiencies.

[145] In addition, APEGA was directed "use its best efforts to match Mr. Mihaly with a Mentor who has a similar background and who can provide him the necessary guidance to approach his challenges as an engineer and gradually integrate himself into the profession", and to direct Mr. Mihaly to resources to "allow him to network with other foreign engineering graduates facing similar challenges" and to "assist him to increase his fluency and facility in the use of the English Language" (Tribunal Decision at para 249).

[146] These directions go beyond the scope of any discriminatory conduct found or even alleged. But even in relation to alternatives to examinations, the appointment of a committee to assess an applicant and provide individual "assistance and guidance to progress gradually in the engineering profession" would appear to entail a significant dedication of resources. As the Tribunal contemplated that APEGA could be called upon to provide this assistance for approximately 375 applicants a year, his assessment that this "would not cause undue hardship to the engineering profession nor does it appear to be cost prohibitive with all the dues-paying members" (Tribunal Decision at para 231) is questionable, to say the least. The assessment of the Appeal and Review Board in ***LPG*** that individual testing would be costly and inefficient (and would not provide a consistent, standardized and objective evaluation) is much more realistic.

[147] More significant than the Tribunal's assessment of cost, is his failure to consider the impact that this form of accommodation would have on APEGA, fundamentally altering its standards and being required to act outside of its regulatory role. As ***Hydro-Québec*** makes clear, employers do not have a duty to change working conditions in a fundamental way. Even more so, regulatory bodies should not be expected to change their mandate in a fundamental way.

[148] Finally, the Tribunal failed to consider Mr. Mihaly's obligation to assist in the search for possible accommodations. The Tribunal contemplated that Mr. Mihaly should be granted "the option to challenge specific examinations in areas where he is not granted an exemption by [APEGA]" (para 249) but did not consider the fact that Mr. Mihaly had failed to even attempt either the three confirmatory examinations or the FE Exam.

[149] The Tribunal's reasons leading to his conclusion that APEGA could have accommodated Mr. Mihaly and others sharing his characteristics are rife with logical errors, findings of fact that are not supported by the evidence, and failures to take into account relevant considerations. From the Tribunal's unreasonable interpretation of the *EGPR,* to his unsupported assumption that the FE Exam disproportionately excludes foreign trained engineers from being registered with APEGA, to his failure to appreciate that demonstrated entry level engineering competence is reasonably necessary to safe practice as a professional engineer, and his failure to consider relevant factors in the assessment of undue hardship, it is clear that his conclusion regarding accommodation falls outside the range of acceptable outcomes that are defensible in light of the facts and law; and as such was unreasonable: ***Dunsmuir*** at para 47.

[150] While the Tribunal reasonably concluded that Mr. Mihaly had established *prima facie* discrimination with regard to APEGA's requirement that he complete confirmatory examinations or the FE Exam; his conclusion that APEGA had failed to justify these requirements under s 11 of the *AHRA* was unreasonable. APEGA's undisputed evidence clearly met the onus to establish the "reasonable and justifiable" defence: ***Wright*** at paras 127-29.

Disposition of the Appeal

[151] APEGA in its Notice of Appeal sought a "reversal of the decision of the Human Rights Tribunal."

[152] The *AHRA*, in s 37(4), sets out the powers of the Court of Queen's Bench on appeal of a decision of a human rights tribunal:

> (4) The Court may
>
> (a) confirm, reverse or vary the order of the human rights tribunal and make any order that the tribunal may make under section 32, or
>
> (b) remit the matter back to the tribunal with directions.

[153] I conclude that the decision of the Tribunal should be reversed. There is no need, in the circumstances, to remit the matter back to the Tribunal.

Disposition of the Cross-Appeal

[154] Mr. Mihaly's cross-appeal relates to remedy only, and is therefore dependent on a finding

of *prima face* discrimination that has not been justified under s 11 of the *AHRA*. It follows from my conclusion on the appeal, that the cross-appeal is dismissed.

Heard on the12th day of December, 2014 and 23rd - 24th day of July, 2015.
Dated at the City of Edmonton, Alberta this 26th day of January, 2016.

J.M. Ross
J.C.Q.B.A.

Appearances:

James T Casey, QC
Field Law LLP
for the Applicant

Ladislav Mihaly
Self-represented Respondent

Ritu Khullar, QC
Chivers Carpenter
for the Alberta Human Rights Commission
(Not a Party to the Appeal)

David Phillip Jones, QC
de Villars Jones
for the Intervener The Law Society of Alberta