# Confirmatory Exams for Foreign-Trained Engineers Is Not Discriminatory: Engineering Regulator Successfully Appeals Alberta Human Rights Tribunal Decision

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In its substantive written decision, the Alberta Court of Queen's Bench has reversed a 2014 decision of the Alberta Human Rights Tribunal (the "Tribunal") in *The Association of Professional Engineers and Geoscientists of Alberta v. Milhaly*, 2016 ABQB 61.

## The Case

Mr. Milhaly, born and educated in the former Czechoslovakia, arrived in Canada in 1999 with his foreign engineering credentials and work experience. Upon arrival, he applied to the Association of Professional Engineers and Geoscientists of Alberta ("APEGA") to register as a Professional Engineer. Upon reviewing Mr. Milhaly's application and supporting documents, APEGA informed Mr. Milhaly that he would be required to write the National Professional Practice Exam ("NPPE"), required by all applicants, and would also be required to take three (3) confirmatory exams and take a course or pass an equivalency exam (i.e. the Fundamentals of Engineering Exam — 'FE Exam') by a prescribed deadline. Mr. Milhaly's application proceeded slowly over the course of the next several years and ultimately, Mr. Milhaly failed the NPPE three times and never wrote any of the required confirmatory exams.

Shortly thereafter, Mr. Milhaly filed a complaint with the Alberta Human Rights Commission, alleging that APEGA had discriminated against him on the basis of place of origin by denying his registration as a professional engineer. The Tribunal agreed with Mr. Milhaly, finding that APEGA's assessment and eligibility criteria (in Mr. Milhaly's case, the requirement to complete confirmatory exams and take a course or the FE exam), without a more individualized assessment and options tailored to Mr. Milhaly, amounted to discrimination which could not be justified under the *Alberta Human Rights Act* (the "Act"). The Tribunal went further, ordering APEGA to appoint a committee which would be responsible for investigating options to individually assess Mr. Milhaly's qualifications (including a waiver of one or more of the required exams), assign an engineering mentor to Mr. Milhaly who could help integrate Mr. Milhaly into the

profession, direct Mr. Milhaly to networking resources and to assist Mr. Milhaly with increasing his fluency in English.

Given the breadth and the potential impact of the Tribunal's order, it is unsurprising that APEGA chose to appeal the Tribunal's decision. APEGA appealed on a number of grounds, including whether there had been a breach of procedural fairness, jurisdiction of the Tribunal, the correct test for prima facie discrimination and whether it was unreasonable for the Tribunal to hold that APEGA's criteria could not be justified. On the first two grounds of appeal, the Court sided with the Tribunal. On the latter two issues, however, the Court came to a very different conclusion.

On the issue of prima facie discrimination, the Court found that the Tribunal had applied the correct test, namely the Supreme Court of Canada's ("SCC") *Moore* test. According to the *Moore* test, a complainant must show the following to establish prima facie discrimination:

- They have a characteristic that is protected from discrimination;
- They have experienced an adverse impact; and
- That the protected characteristic was a factor in the adverse impact.

In its analysis, the Court also observed the following:

- Discrimination is not limited to rules and practices based only on the listed protected characteristics — it can also occur where a neutral rule/practice has an adverse impact and the protected characteristic is a factor in that adverse impact (for example, although language is not a protected ground, terminating someone's employment due to language difficulties could establish enough of a nexus between the language difficulties and that person's place of origin such that it establishes prima facie discrimination).
- While arbitrariness and perpetuation of stereotypes are relevant considerations in determining whether there is a link between a protected characteristic and the adverse impact, these considerations are not required a part of the *Moore* test.

At the outset, the Court held that the Tribunal's finding that APEGA's policies were based on discriminatory assumptions was unreasonable and not supported by the evidence. The evidence showed that APEGA's accreditation system was comprehensive and complex, and the distinction between accredited and non-accredited engineering programs was not based on an assumption of inferior academic qualifications (but rather, a lack of knowledge about the non-accredited programs).

While the Court did find that Mr. Milhaly's place of origin was a factor in the adverse impact that he suffered (given the close link between his place of origin and the place of his education), it pointed out that the Tribunal's finding was that the adverse impact related to Mr. Milhaly's place of origin was the requirement to complete the confirmatory exams, and that this, in addition to the requirements to write the NPPE and have Canadian work experience) perpetuated disadvantage and constituted substantive discrimination. The Court took issue with this finding, noting that the *Moore* test had not been properly applied or addressed with respect to the NPPE and Canadian work experience requirements, that there was no evidence or basis for the finding that these requirements (which applied to all applicants, not just foreign) constituted adverse impact discrimination, and that there was no finding or evidence that established that

these requirements had an adverse impact based on place of origin or constituted prima face discrimination.

The Court then moved on to consider whether APEGA had a reasonable and justifiable defence under the Act, both in relation to the confirmatory exams and also the NPPE and Canadian work experience. With respect to the NPPE and Canadian work experience requirements, the Court held that because no prima facie discrimination had been established for these requirements, the Tribunal had no jurisdiction to find that the requirements were not justified under the Act. Because the Court had found that the confirmatory exams were prima facie discriminatory, it turned to the SCC's well-established *Meiorin* test (which effectively looks at why a purpose or standard was implanted and whether reasonable accommodation of an individual was possible in the circumstances) to see if the breach was reasonable and justifiable in the circumstances.

Before delving into its analysis, the Court pointed out that employers do not have a duty to change their working conditions in a fundamental way — rather, they only have a duty (to the point of undue hardship) to ensure that it arranges an employee's workplace/duties in a way that will enable the employee to do his or her work. In this case, the Court found that there was no evidence that APEGA could or should be expected to be proactive and reach agreements with non-accredited institutions or countries, no evidence that confirmatory exams were assigned based on perceived academic deficiencies and no evidence that the FE Exam or confirmatory exam requirement would have a disproportionate impact on foreign-trained graduates. The Court further found that that impugned exams were designed to test the knowledge expected of engineering graduates, and that possession of entry level engineering competence was reasonable necessary to safe practice as a professional engineer. Finally, the Court tackled the accommodation measures that were ordered by the Tribunal. In finding the measures to be unreasonable, the Court noted that the Tribunal went far beyond the scope of discriminatory conduct found (or even alleged) and failed to consider the efficiency and cost impacts to APEGA in trying to implement such measures.

In sum, the Court held that while Mr. Milhaly had established prima facie discrimination caused by APEGA's confirmatory exam and FE Exam requirements, the evidence clearly established that these APEGA requirements were reasonable and justifiable under the Act.

# The Takeaway

This decision was ultimately a win for APEGA, and for professional regulators as a whole, as it established that regulators are not expected to alter their mandate in a fundamental way provided that their entrance standards for foreign-trained professionals (those which differ from standards required for Canadian-trained professionals or professionals from accredited institutions) are based on evidence and not discriminatory assumptions.

For non-regulator employers, this decision serves as an important reminder that care should be taken when setting specific job requirements or requiring completion of certain courses or testing as part of the job application or promotion process. Specifically, consider why a certain requirement is being implemented, whether it is necessary for the position, whether there is room for accommodation (if needed), and

whether the requirement (although seemingly neutral or compliant with the Act) might have an adverse impact that is linked to a protected ground (i.e. requirement for a Canadian degree or work experience).

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