HUMAN RIGHTS TRIBUNALS OF ALBERTA

Citation: Mihaly v. The Association of Professional Engineers, Geologists and Geophysicists of Alberta, 2014 AHRC 1

BETWEEN:

Ladislav Mihaly

Complainant

- and -

The Association of Professional Engineers, Geologists and Geophysicists of Alberta (APEGGA)

Continued as a corporation with the name Association of Professional Engineers and Geoscientists of Alberta (APEGA)

Respondent

DECISION

Tribunal Chair: Moosa Jiwaji, MBA, LL.B

Decision Date: February 6, 2014

File Number: S2008/12/0294

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INTRODUCTION

[1] Mr. Ladislav Mihaly filed a complaint with the Alberta Human Rights Commission (the Commission) on August 5, 2008, alleging that he was discriminated against by the Association of Professional Engineers, Geologists and Geoscientists of Alberta (APEGGA)[1] when he was denied registration as a Professional Engineer. This complaint is about whether the requirements imposed upon Mr. Mihaly by APEGGA for registration as a Professional Engineer are contrary to the *Alberta Human Rights Act* (the Act).[2]

BACKGROUND

[2] This background of this complaint is not in dispute and is supported by documentary information (see binder provided by APEGGA.)

[3] Mr. Mihaly was born in Czechoslovakia and states in his complaint that he has two Masters degrees from Czechoslovakia. One was obtained from the Slovak University of Technology in Bratislava and the other was obtained from the Institute of Chemical Technology (ICT) in Prague.

Application

[4] Mr. Mihaly first applied to APEGGA for registration as a Professional Engineer in May 1999.

[5] In his Application for Registration, he described his qualification from the Slovak Technical University in Bratislava as a M.Sc. Diploma. He attended this institution from 1970 to 1975 and graduated with a specialization in Technology of Fuels and Thermal Energy.

[6] He described his qualifications from the Institute of Chemical Technology (ICT) in Prague as a Certificate in Corrosion Engineering. He attended the ICT from 1977 to 1979 and graduated in 1981.

[7] In his Application, Mr. Mihaly also provided the names of three references who he had worked for in Bratislava so that APEGGA could send them reference questionnaires for completion.

[8] APEGGA acknowledged his application in a letter dated May 13, 1999 and requested transcripts, visa and Landed Immigration form. APEGGA also advised Mr. Mihaly that he was required to write the National Professional Practice Exam (NPPE).

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[1] *Now called the Association of Professional Engineers and Geoscientists of Alberta*
[2] *Alberta Human Rights Act, R.S.A. 2000, c.A-25.5*

[9] On January 28, 2000, the Board of Examiners considered Mr. Mihaly's transcripts, reference questionnaires and experience, and decided that his degree from the Slovak Technical University in Bratislava had many elements of chemical engineering and that his experience was long but narrow and that the references were from supervisors with short exposure.

[10] APEGGA advised Mr. Mihaly on February 11, 2000 that he must, in addition to passing the NPPE, complete three confirmatory examinations and take a course or pass an equivalent exam in Engineering Economics by May 2001.

[11] On February 11, 2000, APEGGA also advised Mr. Mihaly that he had failed his first attempt at the NPPE, which he had written on January 17, 2000.

[12] 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.

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

First Reactivation

[14] On May 31, 2002, Mr. Mihaly asked APEGGA to reactivate his application for registration and he also applied to write the NPPE on July 15, 2002. He explained in his e-mail that he was unable to respond earlier because he was in a serious car accident and had health problems after his accident.

[15] On June 3, 2002, APEGGA reactivated his file and advised Mr. Mihaly that he was supposed to write the three confirmatory examinations by May 2003 and the Engineering Economics exam by November 2003.

[16] On June 20, 2002, Mr. Mihaly wrote to APEGGA and mentioned the following:

> *By the way I did get also a very surprising information too. Till now I never had this information at all from you or from the APEGGA. The subject is that my Master of Engineering Scientist degree from ex Czechoslovakia does not match even the Bachelor degree's requirements in Alberta. I do not know where from is coming up this information because till now it was no word about my academic degree at all.*

[17] On June 20, 2002, he received an e-mail response from Jennifer Scherban of APEGGA and she advised Mr. Mihaly as follows:

> *On February 11, 2000, a letter was sent to you stating that the Board had assessed you three confirmatory exams and the 98-CS-1*

exam to be completed before you could be registered as a Professional Engineer with APEGGA.

This assessment was given to you because your degrees are on the Foreign Degree List as set out by the Canadian Council of Professional Engineers. The confirmatory exams are assessed to those applicants with degrees from institutions on the Foreign Degree List in order to confirm that their education meets APEGGA's standards. That is the purpose of the confirmatory exams assessed to you.

[18] On June 21, 2002, Mr. Mihaly also received a formal reply from Mr. Tokarik of APEGGA in response to his June 19, 2002 e-mail. It stated the following among other things:

We had previously advised you in our February 2000 letter that your degree in Chemical Engineering from Bratislava does not meet APEGGA's academic requirements. We advised you that your degree is listed on the Canadian Council of Professional Engineers Foreign Degree List and that your confirmatory examinations assessment is the standard assessment in such cases.

[19] Mr. Tokarik also advised Mr. Mihaly that APEGGA had no record of advising him previously that his education was considered equal to the Canadian engineering education.

[20] Mr. Tokarik then went on to say:

In your June 19, 2002 e-mail you also indicate that you would like to inform your ex-university that their accreditation is not recognized in Canada or Alberta. I would like to point out that there are no Mutual Recognition Agreements in place between Canada and your former country which recognizes the accreditation system in your former country. As I indicated above, your program is contained on the Council of Professional Engineers Foreign Degree List.

As a result, you were assigned the three confirmatory examinations plus the course/exam in engineering economics. If your program had not been contained on the Foreign Degree List you would have been assigned nine examinations.

[21] On July 8, 2002, Mr. Mihaly had a telephone conversation with Mr. Tokarik. The telephone notes made by Tokarik were put into evidence and suggested that Mr. Mihaly was asking for a waiver based on 10 years of experience. Mr. Tokarik's notes indicate that:

- Mr. Tokarik explained to Mihaly re: confirmatory exams;
- Mihaly indicated that he had close to 12 years of international experience;

- He used to teach his colleagues;
- Worked for years at a Research Institute;
- Mr. Mihaly advised that he would send an updated resume but may not be able to locate the P.Eng supervisor he was working for because the company had gone out of business.
- May be able to get a reference from a Human Resources manager.

[22] Mr. Tokarik sent out a Reconsideration and Appeal Sheet to Mr. Mihaly by fax on July 8, 2008 to file an appeal if he wished. Mr. Mihaly did not file an appeal.

[23] Mr. Mihaly failed the NPPE which he wrote on July 15, 2002.

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

[25] In August 2006, Mr. Mihaly again complained to APEGGA's Director of Professional Practice, Mr. Ray Chopiuk, about APEGGA's refusal to recognize his academic qualifications and the need for him to write the confirmatory exams. Mr. Chopiuk referred Mr. Mihaly to Mr. Tokarik, who at the time was APEGGA's Director of Registration.

Second Reactivation

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

[27] On October 18, 2006, APEGGA advised Mr. Mihaly that they had reactivated his file and given the passage of time, APEGGA requested from him an updated resume and a list of updated references. Mr. Mihaly provided this information on November 16, 2006. He submitted the names of a Professional Engineer he had worked for more than a year in Calgary, a name of a Gas company owner and a name of a co-worker for consideration.

[28] On August 10, 2007, the Board of Examiners reconsidered Mr. Mihaly's application and again determined that Mr. Mihaly had to complete the three confirmatory exams plus a course/exam in Engineering Economics or the Fundamentals of Engineering Examination. The Board also determined that Mr. Mihaly had not acquired the one year required North American professional engineering 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 North American engineering experience.

[29] Mr. Mihaly did not write the required examinations and on August 5, 2008, he filed a complaint with the Commission.

RELEVANT SECTIONS OF THE ACT

[30] Mr. Mihaly filed his complaint under ss. 4, 7 and 9 of the Act.

Section 4 prohibits discrimination in goods, services, accommodation or facilities and provides as follows:

> *No person shall*
>
> *(a) deny to any person or class of persons any goods, services, accommodation or facilities that are customarily available to the public, or*
>
> *(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, 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.*

Section 7 of the Act addresses discrimination in employment practices and provides as follows:

> 7(1) *No employer shall*
>
> *(a) refuse to employ or refuse to continue to employ any person, or*
>
> *(b) discriminate against any person with regard to employment or any term or condition of employment,*
>
> *because of the race, religious beliefs, colour, gender, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income, family status or sexual orientation of that person or of any other person.*

Section 9 of the Act provides as follows:

> *No trade union, employers' organization or occupational association shall*
>
> *(a) exclude any person from membership in it,*
>
> *(b) expel or suspend any member of it, or*
>
> *(c) discriminate against any person or member,*

> *because of the race, religious beliefs, colour, gender, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income, family status or sexual orientation of that person or member.*

Section 44(1)(j) defines "occupational association" as meaning:

> *"occupational association" means an organization other than a trade union or employers' organization in which membership is a prerequisite to carrying on any trade, occupation or profession;*

Application of the particular sections

[31] In *Bitonti v. British Columbia (Ministry of Health),*[3] the Tribunal said that one must take into consideration "the nature of the service and the relationship it creates between the service provider and the service user." The relationship at issue in this case is between APEGGA and Mr. Mihaly and the service being provided by APEGGA can be described as registration or the right to practice engineering in Alberta.

[32] I find that APEGGA is providing a service under section 4.

[33] With respect to section 7, even taking a broad and purposive approach to the legislation, Mr. Mihaly was not in any type of employer or employee relationship with APEGGA and APEGGA did not employ or refuse to employ the complainant. Section 7 therefore does not apply.

[34] It is not in dispute that APEGGA is an "occupational association" and there was no argument that section 9 does not apply. The issue for Mr. Mihaly is that he is unable to practice as an Engineer without a licence and that he is being denied an opportunity to earn a livelihood in his desired profession by APEGGA.

[35] The matter will proceed under sections 4 and 9 of the Act, with the same analysis, given the overlapping nature of these sections in this particular case.

APEGGA LEGISLATIVE FRAMEWORK

[36] APEGGA is a statutory corporation formed pursuant to the *Engineering and Geoscience Professions Act* (*EGPA*)[4] and is the professional regulatory body for the engineering profession.

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[3] *Bitonti v. British Columbia (Ministry of Health)* 1999 *CarswellBC 3186, [1999] BCHTD #60, at para. 64.*
[4] *Engineering and Geoscience Professions Act, R.S.A. 2000, c. E-11.*

[37] An individual cannot practice engineering in Alberta unless they have been approved for registration as a Professional Engineer, licensee, permit holder or certificate holder pursuant to s.2 of the *EGPA*:

> *2(1) Except as otherwise provided in this Act, no individual, corporation, partnership or other entity, except a professional engineer, a licensee so authorized in the licensee's licence, a permit holder so authorized in its permit or a certificate holder so authorized in the certificate holder's certificate, shall engage in the practice of engineering.*

[38] Applications for registration as a professional member of APEGGA are considered by the Board of Examiners (Board) established under s. 30 of the *EGPA*.

Section 30 of the EGPA reads as follows:

> *30(1) The Council shall establish a Board of Examiners in accordance with the regulations.*
>
> *(2) The Minister shall appoint as members of the Board of Examiners 3 persons from a list of members of the public nominated by the Council.*

[39] The Board, pursuant to s. 30(8), may approve the registration, refuse the registration or defer the approval of registration until the applicant has complied with requirements made under this section:

> *30 (8) The Board of Examiners shall consider applications for the registration of applicants as professional members or licensees in accordance with this Part, the regulations and the bylaws and may*
>
> *(a) approve the registration,*
>
> *(b) refuse the registration, or*
>
> *(c) defer the approval of registration until it is satisfied that the applicant has complied with a requirement made under this section.*

[40] The Board under s. 30(9) may require an applicant to pass one or more exams and/or obtain more experience of a kind satisfactory to the Board:

> *30 (9) The Board of Examiners may, in its discretion, require an applicant for registration*
>
> *(a) to pass one or more examinations set by the Board,*

(b) to obtain more experience of a kind satisfactory to the Board for a period set by the Board, or

(c) to pass one or more examinations and obtain more experience before it approves the registration.

[41] The Council is the governing body of APEGGA and is established pursuant to s.12 of the *EGPA*. The Council has the statutory power to make regulations (s.19) and bylaws (s.20).

[42] Section 13 of the *Engineering and Geosciences Professions General Regulation* (EGPR)[5] stipulates the requirements for registration as a Professional Engineer:

13(1) A person who meets the following requirements and applies to the Registrar for registration is entitled to be registered as a professional member:

(a) the applicant is a Canadian citizen or is lawfully admitted to Canada for permanent residence;

(b) the applicant is of good character and reputation;

(c) the applicant has a knowledge of the Act and the regulations under the Act, and general knowledge related to the practice of engineering or geoscience, which has been demonstrated by passing an examination that is prescribed by the Board of Examiners;

(d) the applicant demonstrates to the Board of Examiners that the applicant has a proficiency in the English language that is sufficient to enable the applicant to responsibly practise the profession of engineering or geoscience;

(e) the applicant meets one of the following requirements:

(i) the applicant is enrolled as a ***member-in-training*** *and has obtained at least 4 years of experience in work of an engineering or geoscientific nature that is acceptable to the Board of Examiners;*

(ii) the applicant is enrolled as a ***student*** *under section 6(b)(ii) and*

(A) has completed all examinations prescribed by the Board of Examiners, and

(B) has obtained at least 8 years of experience in work of an engineering or geoscientific nature that is acceptable to the Board of Examiners, at least one year of which is obtained after completion of the examinations referred to in paragraph (A);

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[5] *Engineering and Geoscience Professions General Regulation, Alta. Reg. 150/1999.*

(iii) the applicant is admitted as an ***examination candidate*** *and*

(A) has completed the examinations referred to in section 8(b), and

(B) has obtained at least 4 years of experience in work of an engineering or geoscientific nature that is acceptable to the Board of Examiners;

(iv) the applicant is not in a register or record referred to in subclause (i), (ii) or (iii), but has the combined academic qualifications and experience acceptable to the Board of Examiners that would be required for registration as a professional member had the applicant progressed through one of those registers or records.

(2) notwithstanding subsection (1), an applicant is entitled to be registered as a professional member if

(a) the applicant is of good character and reputation, and

(b) the applicant is registered and in good standing with a professional regulatory organization under an Act of another province or territory of Canada to perform an occupation that, in the opinion of the Board of Examiners, is substantially equivalent, in terms of scope of practice and competencies, to that of a professional member. [Emphasis added]

[43] The requirements for an Examination candidate are outlined in S. 8

8. A person who meets the following requirements and applies to the Registrar for registration is entitled to be admitted as an examination candidate:

(a) the applicant is of good character and reputation;

(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.

[44] Since Mr. Mihaly was registered as an Examination candidate, he would have had to satisfy the conditions in s. 13(1)(e)(iii) to become registered as a Professional Engineer. However,

it should also be noted that the discretionary categorization of Mr. Mihaly as an Examination Candidate by APEGGA in the first place must also be examined in this complaint.

JURISDICTIONAL ARGUMENTS BY APEGGA

[45] The respondent argues that the Tribunal has no jurisdiction to consider Mr. Mihaly's complaint because the Act does not protect against discrimination based upon the "place of origin of academic qualifications". Respondent's counsel referred to the decision of Veit J. in *Grover v. Alberta (Human Rights Human Rights Commission)*[6] where the Court of Queen's Bench considered an allegation of systemic 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 complainant argued that "place of origin" does not mean "place of birth" but "where you came from." The Court rejected this argument and held that "place of origin" cannot be stretched to include the place where the person received their PhD degree.

[46] However, there is also support in the jurisprudence, that the place where an individual receives his education may be considered under the broader grounds of place of origin. Adjudicator Wright in *Giggey v. York Region District School Board*[7] stated:

> *The ground of place of origin reflects the general value that in Ontario society, people should not be discriminated against based upon where they came from. As the Supreme Court stated in* Baker v. Canada (Minister of Citizenship and Immigration), 199 CanLII 699 (SCC), [1999] 2 S.C.R. 817:
>
> > *Our history is one that shows the importance of immigration, and our society shows the benefits* of *having a diversity of people whose origins are in a multitude of places around the world.*
>
> *The ground of place of origin reflects the purpose of ensuring that in the social areas covered by the Code, discrimination based upon where someone came from is prohibited and that people from particular places are not unjustly disadvantaged.*

[47] In *Neiznnaski v. University of Toronto,*[8] Adjudicator Cumming emphasized that people usually obtain their education in their place of origin and accordingly education can generally be used as a proxy for place of origin. The question to be considered is whether there is a nexus between the foreign credentials that are being vetted by the professional body and the place of

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[6] *Grover v. Alberta (Human Rights Commission), (1997) A.J. No. 88 (Q.B.), 1999 ABCA 240 (C.A.).*
[7] *Owyn Giggey v. York Region District School Board 2009 HRTO 2236, at para. 7.*
[8] *Neiznnaski v. University of Toronto, Ontario Board of Inquiry, File 93-0033.*

origin of those credentials which have given rise to the adverse treatment of the complainant. He stated:

> *Constructive or indirect discrimination describes the unequal treatment that foreign-trained people often receive. Ostensibly, they are discriminated against on the basis of their foreign credentials. However, the effect often is to exclude groups linked to their place of origin, race, colour or ethnic origin. People generally obtain their education or training in a place of origin. Thus, place or education or training can generally be used as a proxy for place of origin. A candidate who has recently gained Canadian citizenship or landed immigrant status and who was excluded from consideration for a Residency position because s/he is foreign-trained could complain that s/he is constructively or systematically discriminated against on account of place of origin, in contravention of section 11(1) of the Code.*

[48] In *Bitonti, supra* 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.[9]

[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 APEGGA. The protected ground of place of origin, in these particular facts, is broad enough to include any adverse treatment related to his foreign credentials. Additionally, it will also become clearer in my analysis of the evidence related to the Foreign Degree List (FDL or FD List) that "place of origin" and not just "foreign credentials" is important to APEGGA in analyzing foreign credentials.

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[9] See also: *Garzedi v. Insurance Corporation of British Columbia, 2010 BCHRT 262, [2010] B.C.W.L.D. 8708.*

EVIDENCE

Evidence of the Complainant

A. Mr. Ladislav Mihaly

[50] Mr. Mihaly represented himself at the hearing and was the only witness for his complaint. Mr. Mihaly's evidence was presented to the Tribunal *viva voce* and also through his written information.

Assessment of Mr. Mihaly's engineering credentials when emigrating to Canada

[51] Mr. Mihaly testified that he was very surprised when his education was not considered favourably by APEGGA because before his emigration to Canada, he had his credentials assessed. He stated that he had received two letters confirming that his qualifications were acceptable. He said that one of these letters was from the Canadian Council of Professional Engineers and the second letter was from "engineering technologists" and these letters were not in his possession anymore because it was now fourteen years since he had immigrated to Canada.

[52] In cross-examination, respondent's counsel showed Mr. Mihaly a letter dated September 17, 1997 (Tab 3, Exhibit A, Respondent's Document Binder) which he had provided to APEGGA for registration purposes. Mr. Mihaly, after reviewing the letter, confirmed that it was the second letter he was referring to in his evidence and agreed with counsel that it was from the Canadian Council of Technicians and Technologists. The other alleged letter from the Canadian Council of Professional Engineers was not produced by Mr. Mihaly. He, however, acknowledged when asked by counsel that he had not sent this letter to APEGGA when applying.

[53] Mr. Mihaly, in further cross-examination, agreed with counsel that APEGGA had not sent him a letter stating that his education and overseas skills were the same as a Professional Engineer in Canada. Mr. Mihaly was referred to an e-mail (Tab 17) dated June 19, 2002, which he had sent to APEGGA. Mr. Mihaly, stated in the e-mail that when he had applied for APEGGA registration for the first time, he was informed by APEGGA that his education and skills were fully equal to North American engineers. Mr. Mihaly on further questioning, however, accepted that this representation in his e-mail was not correct since he had received no such information from APEGGA nor had APEGGA confirmed that his education and skills were equal to North American engineers.

Foreign Degree List (FD List)

[54] Mr. Mihaly testified that when he applied the first two times to APEGGA, he was not aware that APEGGA maintained a list of countries for foreign graduates from which to assess foreign credentials. He said after he found out that there was a list of countries on which admission was based, he could not understand why he was forced by APEGGA to obtain documents from the archives of his university, have them translated, certified etc. He further

testified that when he became aware that APEGGA maintained a list of countries by categories for assessing foreign graduates, he became concerned about discrimination based on the country of origin and studied the *Charter of Rights* and the Act. He said he could not find an exception in these documents that would allow an "Alberta authority" to judge someone who had finished university in another country. In cross-examination, counsel for the respondent referred Mr. Mihaly to a letter (Tab 19) written to him on June 21, 2002 by APEGGA advising him that since his program was on the Canadian Council of Professional Engineers Foreign Degree List, he would have to sit three confirmatory examinations and that he would have the option to either do a course or an exam in Engineering Economics. The same letter also stated that if his program had not been on the FDL, he would have been assigned nine exams instead.

International Agreements

[55] Mr. Mihaly submitted that APEGGA was not complying with international agreements that provided for reciprocal recognition of engineers from other jurisdictions, especially the European Union agreements. He suggested that APEGGA should approve all European Union countries in a manner similar to how APEGGA considers engineering graduates from the United States, rather than assessing each country one at a time. In cross-examination, when Mr. Mihaly was asked to be specific about which international agreements he was referring to, he mentioned the Lisbon Treaty. Counsel for the respondent advised him that the Lisbon Treaty was a treaty of the European Union and Canada was not a member of the European Union.

[56] Mr. Mihaly, also in his evidence, referred to an agreement the federal government had apparently signed with the European Union that APEGGA was not taking into consideration. Mr. Mihaly, however, was not specific about this agreement and it was not before me in evidence. Mr. Mihaly also was not specific about any other international agreements APEGGA was not in compliance with when considering foreign graduates for registration.

Payments made to learn interview skills

[57] Mr. Mihaly testified that in preparation for his emigration to Canada from Czechoslovakia, he had to spend a couple of thousand dollars to obtain the training and skills necessary to attend interviews in Canada. In cross-examination he agreed with counsel that the payment he had made was not upon any advice from APEGGA, nor was it paid to APEGGA.

Work Experience

[58] Mr. Mihaly, in his written submissions, explained that he had worked as a Professional Engineer for 25 years in Czechoslovakia. He had worked in senior or lead engineering positions for various international companies including Fluor Daniel, Mitsubishi Heavy Industry, Bureau Veritas, Raytheon Engineering and Japan Gas Company. He had also worked on patents while in Czechoslovakia and on many other projects such as the construction of the international airport in Iraq. He testified that he could have continued working in Czechoslovakia or any country of the

European Union without any requalification and would have earned enough to have a decent life for himself and his family. However, he decided to emigrate to Canada with his family in the hope that he would be able to continue performing at a "high level and develop new standards." He decided to come to Canada because he is specialized in oil and gas and thought he would have opportunities in Alberta. Mr. Mihaly said that it was his expectation that his skills and education would be accepted in Alberta and where he could make a contribution to the engineering profession.

Examinations

[59] Counsel for the respondent directed Mr. Mihaly's attention to an e-mail (Tab 17) dated June 19, 2002, which he had sent to APEGGA. In the e-mail he had stated "I am ready to pass any exam in case if need to be done ..."

[60] Counsel then directed Mr. Mihaly's attention to the first decision (Tab 9) made by APEGGA on February 11, 2000, enrolling Mr. Mihaly as an Examination Candidate and requiring him to do three confirmatory exams to be completed by November 2000 plus an exam in Engineering Economics to be completed by May 2001. Mr. Mihaly said that he did not take the examinations assigned by APEGGA.

[61] Counsel then showed him a letter dated June 3, 2000 (Tab 16) sent by APEGGA to him after he requested APEGGA to reactivate his file. Mr. Mihaly was required to sit the confirmatory exams by May 2003 and the Engineering Economics exam by November 2003. Mr. Mihaly confirmed that he did not take the exams.

[62] Mr. Mihaly was then shown a letter dated August 27, 2007 (Tab 31) sent to him after he again asked APEGGA to reactivate his file and after the Board had reviewed Mr. Mihaly's updated experience qualifications which he had provided to APEGGA. Mr. Mihaly at this time was given the option by APEGGA to do either the Fundamentals of Engineering exam or the three confirmatory examinations and the Economics Engineering examination. Mr. Mihaly confirmed that he did not take the exams.

[63] Mr. Mihaly confirmed for counsel in cross-examination that from the time he began applying to APEGGA in 1999 and up to 2008 when he filed his human rights complaint, he had not taken any of the exams prescribed by APEGGA which would have allowed APEGGA to assess whether his educational qualification were equivalent to Canadian engineers. When asked by counsel why he did not sit the exams, Mr. Mihaly's response was that when he found out he was being treated differently by APEGGA than engineers from countries like France, UK, Ireland etc., he decided not to sit for the examinations.

National Professional Practice Examination (NPPE).

[64] Mr. Mihaly was shown a letter (Tab 2) by counsel dated May 13, 1999 from APEGGA to him advising that he was required to successfully complete the NPPE. Mr. Mihaly agreed with counsel that he was aware that he had to complete the NPPE as far back as 1999.

[65] Mr. Mihaly was cross-examined on a statement he had made in his written submissions to the Tribunal stating that he had received a document from APEGGA confirming that he had passed the NPPE held on October 16, 2000. Mr. Mihaly, however, confirmed on further questioning that although he had received such a letter from APEGGA, he had not written the exam on October 16, 2000 and passed it, as stated in the letter.

[66] Counsel then took Mr. Mihaly through the following documents on APEGGA's file which related to Mr. Mihaly's attempts to take the NPPE:

(a) Mr. Mihaly's application to write the NPPE on January 17, 2000 (Tab 7) and a letter dated February 11, 2000 (Tab 10) from APEGGA advising him that he had failed the NPPE;

(b)Mr. Mihaly's application to write the NPPE on October 16, 2000 (Tab 11) on which was stamped "ABSENT." Mr. Mihaly confirmed that he was absent and did not write the NPPE on that day. This was the exam Mr. Mihaly said for which he had received a letter from APEGGA advising that he had passed the exam;

(c)A fax from Mr. Mihaly dated May 31, 2002 (Tab 14) requesting a reactivation of his file and advising APEGGA that he wanted to sit the NPPE on July 15, 2002;

(d) Mr. Mihaly's application to write the NPPE on July 15, 2002 (Tab 15) and a letter dated August 8, 2002 (Tab 21) from APEGGA advising him that he had failed the examination; and

(e) Mr. Mihaly's application to write the examination on January 20, 2003 (Tab 22) which he again failed. (Tab 23)

Trade

[67] Mr. Mihaly was cross-examined on an e-mail (Tab 25) he had sent to APEGGA on August 20, 2006 with the subject heading: "Do you want to trade?" In the e-mail he was offering APEGGA his experience and skill to revise Alberta's Building and Fire Safety Codes etc. and APEGGA could then judge if he had sufficient skills and theoretical knowledge. He said half of what APEGGA wanted him to do he had taken at high school. Counsel then suggested to Mr. Mihaly that if that was the case, it would have been pretty easy for him to pass the Fundamentals

of Engineering exam APEGGA wanted him to take. Mr. Mihaly said this offer to trade, however, was different. If APEGGA had accepted his offer, APEGGA then would be treating him like an Engineer from UK, Ireland or France.

Impact upon his family

[68] Mr. Mihaly described the impact upon him and his family because he has not been able to work as an Engineer in Alberta. In close to 10 years in Canada, Mr. Mihaly said that he has been unemployed for three years and for about five years he worked in low paying jobs that only required high school education. He said that he tried running a bakery which failed. He has also lost two fingers and has problems with his hearing that now further limits his ability to work as an Engineer. The family presently is on a low income and he lives in a basement suite with his wife and son. The family largely depends on the income of his wife. Mr. Mihaly indicated that his son is also battling mental issues because of all the challenges the family has had to face since emigrating to Canada. He also stated that to do the exams required of him by APEGGA, he had to pay the examination fees and continue maintaining his membership with APEGGA.

Evidence of the Respondent

[69] The following witnesses appeared on behalf of the respondent APEGGA:

A. Dean David Lynch

[70] Dr. David Lynch appeared as an expert witness for the respondent to provide testimony on international agreements and the evaluation of credentials of engineers by APEGGA, but in particular as it relates to the evaluation of engineers educated outside Canada.

[71] Dr. Lynch is the Dean of the Faculty of Engineering at the University of Alberta. He was hired as an Assistant Professor in 1981 and graduated with a Ph.D. in Chemical Engineering in 1982. He became a Professor in 1988 and in 1994 was appointed as the acting Dean of the Faculty of Engineering. In 1995, he became the Dean of the Faculty of Engineering. He has now been the Dean at the University of Alberta for close to 19 years. The Faculty of Engineering at the University of Alberta has about 4,000 students studying for their Bachelor's and approximately 1,600 post-graduate students. The Faculty also has about 200 professors and 150 support staff. Dr. Lynch is a Fellow of Engineers Canada, a Fellow of the Canadian Academy of Engineers, a Fellow of the Engineering Institute, a Fellow of the Chemical Institute and was been awarded the APEGGA Centennial Leadership Award.

[72] Dr. Lynch, as the Dean of the Faculty of Engineering, has a statutory position on APEGGA's Board of Examiners. This is the Board under the legislation which assesses the qualification of all applicants for registration, including Internationally Educated Graduates (IEGs). Dean Lynch has been a member of the Board for approximately 19 years and he has also been a member of APEGGA since 1982. Dean Lynch also belongs to a fairly large number of

other boards which include APEGGA's Charitable Educational Foundation. He is on the Canadian Engineering Accreditation Board (CEAB) whose role is to assess qualifications of engineers within Canada, however, since 1997, CEAB also assesses engineering programs outside Canada to determine whether they have substantially equivalent outcomes in their educational processes as compared to Canada.

[73] Dr. Lynch testified that one of the roles of the CEAB is to negotiate Mutual Recognition Agreement (MRA) with other countries on behalf of Engineers Canada. Engineers Canada is a body that is comprised of representatives from all the provincial engineering association across Canada. CEAB visits countries which have expressed an interest in entering into an MRA with Canada in order to determine if the accreditation processes in those countries are comparable to the Canadian Accreditation process. If CEAB is satisfied with a country's accreditation process, it makes a recommendation to Engineers Canada to enter into an MRA with the country. Engineers Canada in turn recommends it to its members from the provincial engineering associations, who then make the final decision on whether they want to enter into an MRA with the country being recommended. It is only the provincial engineering associations that have the statutory authority to enter into such agreements.

[74] Dr. Lynch has been a member of CEAB for 11 years and has held positions as Chair, Past-Chair, Vice-Chair on CEAB. As a member of the CEAB, he was part of the policy committee when it approved the option to offer the Fundamentals of Engineering (FE) exam to IEGs to confirm their qualifications rather than have the applicants sit for the several confirmatory examinations.

[75] Dr. Lynch described some of the challenges faced by the engineering profession in Canada with respect to the assessment of credentials of IEGs. He testified that the main challenge in Canada is that there are a very large number of IEGs applying for licensure in Canada, especially in Alberta and Ontario. He said there is a high degree of variability in what other countries and institutions call an Engineer and in many countries the word Engineer means something different than in Canada. He stated that in Canada we have a layered system where we clearly distinguish between an engineering technology diploma and an engineering degree. In Canada we also distinguish among Bachelors, Masters and Doctorate degrees. He said that in some countries there is no similar distinction and degrees merge together and it becomes difficult for regulating bodies to determine whether a degree from another country is comparable to a Bachelor's degree in Canada. He provided the examples of China and India. He said in China there are approximately 600,000 graduates a year, but only a fraction of these graduates would be equivalent to our Bachelor's degree. In India, on the other hand, there is a wide variation in quality among the universities. While graduates from the Indian Institute of Technology are of high quality, there is quite a variation in the level of quality in other institutions.

[76] He testified that in Canada we control who is permitted to use the word "Engineer." In Canada the regulation of the engineering profession falls within provincial jurisdiction and the province controls the right to the title to be called an "Engineer" and only those who are properly licensed by a provincial regulatory body can hold themselves out to be Engineers. He said under the provincial legislation only licensed Engineers can practice in certain defined areas and which is very close to unique to Canada. When asked if other countries had similar self-governing statutes, Dean Lynch said only a subset of countries in the world has strong regulatory structures and only a subset has strong accreditation processes.

[77] Dr. Lynch then explained APEGGA's registration process by referring to a schematic that is attached in the *Appendix.*

Canadian Engineering Accreditation Board (CEAB) Graduate

[78] Graduates from Canadian institutions which have requested accreditation for their programs and which have been granted accreditation by the CEAB meet APEGGA's academic requirements for licensure.

[79] Dr. Lynch said the CEAB Accreditation process started in 1965. He explained that if an institution wanted to become accredited, it requests CEAB to send a team to the institution to have their Engineering programs reviewed and accredited. Upon receiving a request, CEAB forms a team for accreditation purposes which includes experts from industry in the academic areas for each discipline offered at the university. The team would also include a Chair, a Vice-chair and two members from the provincial association. The team would then visit the institution, but this is only upon the approval of the provincial regulatory body that is first notified by Engineers Canada of the planned visit by CEAB to the institution. This process is considered a service by CEAB to the regulators to enable the regulators to understand which institutions are academically qualified and whether they meet the academic qualifications with respect to licensure. In Alberta the service is for APEGGA.

[80] Dr. Lynch shared his recent experience for accreditation undertaken by CEAB at the University of Alberta, when a 13-member team visited the school for accreditation purposes. He said accreditation is a very elaborate process. In preparation for the visit, the university had prepared very detailed materials focusing on the quality and content of the curriculum from the first year to graduation. The university also had to provide detailed material on faculty members which he referred to as the "intellectual base" of the university. They also prepared detailed materials on the facilities including laboratories, computing facilities, undergraduate laboratories, buildings and the libraries. The material that was prepared comprised about 7,000 pages and weighed approximately 1,700 kilograms. There were also 2,000 electronic files comprising 1.6 gigabytes of material. He estimated that the process of preparing for the accreditation took about 18 months and had a cost value of somewhere in excess of one million dollars.

[81] The actual visit by the team was over three days which included a weekend. The team met with him as the Dean of the Faculty, a majority of Faculty members, the President and key Vice-Presidents of the University. They also examined the libraries, facilities and the curriculum in detail and held a number of meetings with faculty members, graduate students, etc. They basically looked at every possible aspect of the Faculty of Engineering over the three day period. It is essentially a quality checking, quality management and a quality assurance process and the fundamental purpose is to ensure that every single graduate, without exception, meets every requirement. He termed it a "weakest-link" approach meaning that if there was a single violation by any graduate in terms of meeting every requirement, then accreditation is not granted to the institution. The accreditation is not of the institution, but of individual programs.

[82] After the visit, the team writes a detailed report assessing the accreditation criteria and determining if they have been met. The Dean receives the report and has to respond in detail to any concerns raised by the team. The entire Accreditation Board of 15 members then meets over five days to consider the accreditation report and the Chair of the team reports to the full Board, which then makes the final decision on whether to grant accreditation to the institution.

U.S.A. Accreditation Board for Engineering and Technology (ABET)

[83] Dr. Lynch explained the accreditation process in the United States which he said was broadly comparable to the accreditation process in Canada. Universities in the U.S., in the same way as in Canada, request visits by ABET for accreditation purposes and students graduating from these universities would graduate with ABET Accreditation.

[84] Dr. Lynch said that when U.S. engineers apply for licensure in Alberta, the Board of Examiners assigns them the FE exam to confirm the quality and the nature and content of the degree, but if a detailed review of the individual's background indicates eight years of progressively responsible technical experience or a Masters degree or a Doctoral degree in the same area of their Bachelor's level degree and the degree is from a Canadian, U.S. or an institution with which APEGGA has a MRA, the FE exam is waived deeming that the applicant has met the academic requirements for licensure. The applicant, however, still has to satisfy the other requirements, i.e. experience, character, language etc.

[85] Dr. Lynch stated that the FE exam is a compulsory exam in the U.S. for all graduates in the U.S. who wish to be licensed as a professional engineer in the U.S. and Alberta uses the same exam to confirm the quality and the nature and the content of an engineering degree. He said at the University of Alberta, students are educated on the broad elements of engineering and then they can write the examination if they are considering working in the U.S. He said that APEGGA is authorized by the U.S. National Council of Engineering Examiners and Surveyors (NCEES) to offer the FE exam in Alberta.

Washington Accord

[86] Dr. Lynch then explained the Washington Accord. He said that there are 15 signatories to the Washington Accord and Canada is one of the founding members of the Washington Accord. The six original countries were Australia, Canada, Ireland, New Zealand, and United Kingdom. The U.S. founded the Washington Accord in 1989 and nine other countries have joined the Washington Accord since 1989 e.g. Japan, Korea, Singapore, Malaysia, etc. He said the Washington Accord is a voluntary agreement and the original purpose was to be able to establish certain countries which have substantially equivalent accreditation processes within their jurisdiction for the accreditation of engineering undergraduate program. It was the regulatory bodies in each of these countries who were concerned about the protection of the public and who wanted to ensure that graduates have the right academic experience prior to the licensure process. It is an agreement among the regulatory bodies that each other's accreditation processes are substantially equivalent and give substantially equivalent outcomes.

[87] Dr. Lynch then explained the process for joining the Washington Accord. A regulatory body from a country that wishes to join has to apply to become a provisional member. When an application for provisional membership is received, a team is then assembled of existing members of the Washington Accord who would then visit the country and try to fully understand the internal accreditation and regulatory process. A report would then be prepared and sent to Engineers Canada and CEAB would review the report on its behalf to determine whether there appears to be equivalency to the Canadian Accreditation process. The accreditation systems do not have to be identical, but have to be substantially equivalent. Dr. Lynch said he was involved with the applications of Japan, Korea and Singapore. He said that a country only becomes a signatory to the Washington Accord if there is unanimous agreement of all the existing signatories. After a country is accepted as a member, it has to maintain its status which is subject to verification every six years.

[88] He said if a graduate applying for licensure is from a program that is offered in the country with which CEAB has signed a MRA under the Washington Accord, then the approach is a "looking-to-exempt" approach. APEGGA would not assign exams because the accreditation process is deemed to be substantially equivalent to the Canadian accreditation process. APEGGA, however, would conduct a detailed review of the applicant's qualifications to determine that nothing is unusual which would require examinations. He said this may occur if the applicant is from a country that allows for a certain number of failures which are not allowed in the Canadian Accreditation system. In such a case, examinations would be assigned but this is usually in a very small number of cases. The vast majority of applicants from programs in the Washington Accord do not have exams assigned to them. Dr. Lynch confirmed that Slovakia has never applied to be a member of the Washington Accord.

France - Canada Accord

[89] Dr. Lynch testified with respect to the MRA between France and Canada entered into by Engineers Canada. Dr. Lynch said that this accord was entered into in 1990. It is very similar to the Washington Accord. The two countries examined the accreditation processes of each other and found them to be substantially equivalent. When graduates from France come to Alberta, they are evaluated by APEGGA and are exempted from examinations unless there is something out of the ordinary in the transcript or the background of the graduate which would require the taking of examination. The Accord with France has been approved by APEGGA and all the other provinces except Ontario that has chosen not to ratify it. Whether or not to ratify an agreement is within the purview of the provincial regulatory authority and Ontario is the only province that has decided not to ratify it. This accord is reviewed every five years.

CEAB Substantially Equivalent Program

[90] Dr. Lynch said that in 1997, CEAB, through Engineers Canada, took on the additional role at the invitation of institutions in other countries to review programs and determine whether a particular program was "Substantially Equivalent" to an accredited program in Canada. Dr. Lynch was careful to emphasize that the exercise here is not to grant accreditation to a particular program, but to assess whether a program was "Substantially Equivalent" to a similar-named program that is accredited in Canada. The reason CEAB decided to undertake such reviews was to promote internationally the levels of quality and quality checking assurance expected of engineering degrees and to have the CEAB process seen as an international standard. The other goal is to provide assistance to countries to develop processes and systems that would give similar outcomes in their engineering education and their accreditation processes as in Canada. CEAB does not seek out the countries. Countries apply to CEAB and upon invitation CEAB visits the countries. The process of accreditation is very similar to the CEAB Accreditation program for universities in Canada.

[91] The Substantial Equivalency assessment is of a particular program and the institution has to go through a renewal process similar to the CEAB Accreditation process. Sometimes the Substantial Equivalency would end. In some cases CEAB would decline to visit a country if it appears that the country was not intending to establish its own accreditation and regulatory processes.

[92] When a graduate from an institution assessed as a CEAB Substantially Equivalent Program applies for registration, APEGGA generally exempts the graduate from examinations, unless there are some anomalies after an individualized assessment. This is very similar to the approach taken under the Washington Accord and the France-Canada Accord. Dean Lynch confirmed that the Slovak Technical University of Bratislava from where Mr. Mihaly received his engineering education has never applied to CEAB to undergo the Substantial Equivalency assessment.

Foreign Degree List (FD List)

[93] Dr. Lynch explained the purpose and use by APEGGA of the Foreign Degree List (FD List). He said that the FD List was constructed a number of years ago to assist the regulators and is done through the Canadian Engineering Qualification Board (CEQB), a parallel board to CEAB. He explained that CEQB has prepared an FD List of several thousand institutions by conducting paper reviews of the institutions. This review is not through an accreditation process, but through a review of the calendars of universities, colleges, etc., and other publicly available information on the institution with respect to programs that appear to be engineering programs. The FD List is used by the Board of Examiners of APEGGA when graduates from foreign institutions, which have not been rated to be CEAB Substantially Equivalent Program, apply for registration.

[94] APEGGA initially assigns the FE exam or three confirmatory examinations to graduates from institutions on the FD List. APEGGA then undertakes an assessment and if the applicant had some other attributes like a Masters or a Doctoral degree in Engineering completed at a Canadian institution or in a country with which CEAB has a MRA, then APEGGA would consider waiving the examinations. The examinations may also be waived if the applicant has 10 years of progressively responsible engineering experience. Dr. Lynch reviewed the FD List and confirmed that the universities Mr. Mihaly graduated from were included in the FD List.

[95] Dr. Lynch testified that where the institution is not on the FD List, graduates from such institutions are usually assigned the FE exam or five confirmatory examinations, which may be waived as described above after an assessment of education and experience of the graduates.

Fundamental of Engineering (FE) Examination

[96] Dr. Lynch explained the current preference of APEGGA to use only the FE exam to confirm the quality of an undergraduate engineering program. This exam is set by a group in the U.S. called the National Council of Engineering Examiners and Surveyors. APEGGA is of the view that rather than assigning confirmatory exams to applicants, they are assigning only the FE exam to assess an applicant's undergraduate education in Engineering. This decision was made by APEGGA after a lot of examination and testing to ensure that the FE exam is reliable. After a detailed study, APEGGA concluded that it should move to increasingly use the FE exam as an instrument which appeared to give very reliable confirmation of the quality of an undergraduate engineering program.

[97] Dr. Lynch stated that information on the FE exam is provided to all the graduates at the University of Alberta if they are considering practising engineering in the U.S., where the exam is compulsory. He said the pass rate of Alberta graduates taking the FE exam is about 98 per cent.

[98] In concluding his testimony, Dr. Lynch stated that the process used by APEGGA is broadly similar to the processes used in other Canadian jurisdictions and an applicant's place of

birth plays no role in the process of evaluating a graduate in engineering from a foreign jurisdiction. He also said that the Lisbon Treaty or the UNESCO Convention plays no role in APEGGA's evaluation process.

[99] In cross-examination, Mr. Mihaly asked Dr. Lynch how APEGGA assesses post-graduate degrees. Dr. Lynch explained that a Masters program has a different definition in other countries compared to Canada. He said in many of the European countries a Masters degree is a five-year degree with a thesis, but these programs appear to be closer to what is considered to be a Bachelor's degree program in Canada. A Masters degree at Canadian universities is of two years duration and requires a detailed thesis.

[100] Mr. Mihaly then inquired about why APEGGA judges him differently than other citizens of Europe. Dean Lynch explained that countries like France, Ireland and the United Kingdom had voluntarily subjected to the processes of evaluation and have undertaken to abide by them and, therefore, applicants from these countries are treated differently by APEGGA than applicants coming from Slovakia or Germany. He said the Slovak Technical University of Bratislava had not requested an evaluation for Substantial Equivalency like Graz in Austria had done. Dr. Lynch emphasized that APEGGA's assessment is not on the basis of the citizenship of the person, but more on the basis of where the institution is located because many institutions have individuals who are from other countries who study at these institutions.

[101] Mr. Mihaly asked why Canada, when it entered into a MRA with the U.S., included all of the U.S. in the agreement, but when it comes to Europe they deal with each country individually. Dr. Lynch explained that although countries in Europe belong to the European Union, each country in the European Union is a sovereign state and operates independently. It is for this reason that CEAB has agreements with individual sovereign countries in Europe. When Mr. Mihaly asked Dean Lynch why Russia was treated differently than Ukraine, Dean Lynch said Russia had applied to be assessed under the Washington Accord, but Ukraine had not made any overtures to join the Washington Accord.

B. Dr. Gary Faulkner

[102] Dr. Gary Faulkner was the second witness for APEGGA. Dr. Faulkner has a Ph.D. in Applied Mechanics which he obtained from the University of California in 1969. After obtaining his Ph.D., he returned to the University of Alberta and took a position in the Department of Mechanical Engineering. He progressed through various levels at the University of Alberta and eventually became the Chair of the Department, a position which he held for seven years. He left the University of Alberta in 2009 to work for the Glenrose Rehabilitation Hospital where he is now a Director of Rehabilitation, Research and Technology Development.

[103] Dr. Faulkner testified that he joined the APEGGA Board of Examiners in 1988 and has been on the Board since that time. In 1995, he became the Chair of the Board of Examiners and has continued to hold this position. He said the Board considers on average about 6,000 applications in a year. He stated that since 2008, he has also been a Board Member of the CEQB

and is in his second three-year term with this particular Board. He explained that CEQB is a body sponsored by Engineers Canada that looks essentially at qualifications of engineers around the country and is funded by the various professional associations. CEQB makes recommendations to the provincial bodies on the qualifications for engineers, however, the final decision for all engineering applicants are made by the provincial association.

[104] Dr. Faulkner provided an overview of the role of the APEGGA Board of Examiners. He said it was a statutory committee under the *Engineering and Geosciences Professions Act* and is responsible for the admission of Engineers and Geoscientists into the profession in Alberta. It is comprised of about 50 plus members and half the members of this Board are academics who represent the various disciplines within the engineering and geosciences disciplines and the other half are experienced members from industries. In addition, there are three members from the public and the Deans of the Faculty of Engineering in Edmonton and Calgary. He stated that the full Board of Examiners considers issues and sets policy. It meets twice a year and a sub-group of this Board, called the Executive Committee, meets 11 times in a year to consider individual applications for admission. He said the Executive Committee is about as big as the full Board. The full Board has about 56 members and the Executive Committee has about 50 members. He explained that an application is reviewed by the Executive Committee for two components, one of which is education and the other is experience. The educational qualifications are assessed by the "academic examiners" and the experience of the applicant is assessed by the "experience examiners" on the Executive Committee. The assessment then comes back to the Board for discussion and a decision. He estimated that about 30 per cent of the Board of Examiners is internationally trained engineering graduates and geoscientists. He confirmed that when Mr. Mihaly's application was considered in 2007, it was reviewed by about 35-40 members at the Executive Committee level and that he was one of the members of that committee when Mr. Mihaly's application was considered.

[105] Dr. Faulkner testified that CEAB was an advisory body. The work done by CEAB in the area of MRAs, CEAB Substantial Equivalency and FD List is recommended to APEGGA for adoption, but APEGGA makes the final decision on whether to adopt it or not.

[106] Dr. Faulkner stated that to be registered as an Engineer in Alberta, one must have four years of experience of which one year must be Canadian because APEGGA wants the 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. He confirmed that an individual who graduates from a CEAB-accredited school in Canada and who has worked overseas for four years would also be required to obtain the one-year Canadian experience before admission.

[107] Dr. Faulkner then explained the confirmatory exams applicants are required to take by APEGGA. He testified that confirmatory exams are offered twice a year and typically they cost about $100 per exam. He said confirmatory exams are to give APEGGA a certain level of confidence in the technical preparation that has gone into the education of an applicant. He said because of the varying levels of confidence in different educational institutions and because

APEGGA has a duty to protect the public, APEGGA has to ensure that those who are registered as engineers have a certain particular level of education, confirmatory exams are therefore used for quite a large number of differing educational backgrounds from different countries. He said the confirmatory exams are developed to cover the subject matter that APEGGA would expect to see in someone who has graduated from a Canadian-accredited program and are developed by individuals at the University of Alberta or the University of Calgary. Applicants choose confirmatory exams in their area of specialization from two groups. One group is made up of required courses and candidates have to choose two exams from about seven offered courses in that group and from the second group, candidates have to choose one exam from the offered courses. These are considered optional areas which may or may not have been part of the applicant's program. The exams are typically three hours in length.

[108] Dr. Faulkner was then referred to the first assessment of Mr. Mihaly's application done by APEGGA on February 11, 2000. (Tab 9) He said Mr. Mihaly's education was judged by the academics on the Board to be closely related to the Chemical Engineering program. Mr. Mihaly was therefore asked to sit two compulsory exams from Group A in Chemical Engineering and one from Group B. Additionally, Mr. Mihaly was required to sit an exam in Engineering Economics. This requirement could have been satisfied by taking the three-hour CS1 exam offered by APEGGA or by taking an equivalent course at the University of Alberta or University of Calgary. He said if Mr. Mihaly had taken these exams and passed, APEGGA would have recognized his academic qualifications.

[109] Dr. Faulkner was then shown the letter from the Canadian Council of Technicians and Technologists (Tab 3) Mr. Mihaly had provided to APEGGA as part of his application and which he had obtained when he was immigrating to Canada. He said the letter was an assessment from a technologist's or technician's perspective. He said such programs in Alberta are offered by NAIT or SAIT and are generally two-year programs. He further testified that letters provided for immigration purposes have no bearing on the registration of an individual as an Engineer because the professional registration of engineers is a provincial matter and it is done after an investigation by APEGGA. He said he had reviewed Mr. Mihaly's application file and there was no letter on file dealing with the assessment of him as a Professional Engineer.

[110] Dr. Faulkner was then asked to review a document which he confirmed were minutes (Tab 8) from the Executive Board of Examiners' meetings when Mr. Mihaly's application was reviewed for the first time on January 28, 2000. Dr. Faulkner also reviewed Mr. Mihaly's application (Tab 1) in which he had stated that he had obtained a Masters of Science Diploma in 1975 in the Technology of Fuels and Thermal Energy from the Slovak Technical University in Bratislava and a Certificate in Corrosion Engineering from the Chemical Technological University in Prague. Mr. Mihaly was requesting that he be assessed either as a Mechanical or Petroleum Engineer. Dr. Faulkner was asked to explain why in the Minutes of the Board, Mr. Mihaly's degree was referred to as a Bachelor's degree when the document Mr. Mihaly had submitted said Masters of Science. Dr. Faulkner said that Mr. Mihaly's application was referred to as Bachelor's because it was equivalent to a Bachelor's degree according to the FD List and

after reviewing the program, the Board found it to be closer to Chemical Engineering rather than Mechanical or Petroleum Engineering.

[111] Dr. Faulkner testified that after reviewing the educational qualifications of an applicant and assigning the confirmatory exams, the Board takes into consideration the experience of the applicant and may consider waiving some of the examinations depending on the type of experience. However at this stage, the Board does not only consider the length of the experience, but also looks for experience of increasing responsibility and complexity. Dr. Faulkner testified that after considering Mr. Mihaly's qualifications, the standard confirmatory exams were assigned to him and although Mr. Mihaly had long experience in piping design and fabrication, the Board did not think it was of the type of experience which had increased in responsibility or complexity. Mr. Mihaly was therefore advised on February 11, 2000 that his qualifications did not meet the requirements for professional memberships, but he was accepted as an Examination Candidate and he was asked to do the confirmatory examinations and an examination in Engineering Economics. Dr. Faulkner said this was the standard assessment for graduates with degrees in engineering on the FD List and the exams are to confirm the understanding of material already studied by the applicant.

[112] In order to prepare for the exams, applicants are provided appropriate syllabi which outline the material to be covered in the exam and a list of textbooks for each of the examinations. He said the syllabi would be the same material they would expect of a CEAB graduating from an accredited program in Canada. Dr. Faulkner testified that after the examinations are completed successfully by an applicant, the Board again reviews the experience because while the applicant is doing exams he may have accumulated further work experience. Dr. Faulkner confirmed that Mr. Mihaly did not write any of the exams he was asked to write by APEGGA.

[113] Dr. Faulkner then explained the process for examination assessment appeals. He testified that there are two levels of appeal. The first level of appeal is a request to the Executive Committee for a recommendation. In this case the applicant would provide more material which may include educational documentation or expanded experience documents and the Executive Committee would reconsider the application. If this reconsideration was denied, the applicant could go to the second level of appeal and ask the full Board to consider the appeal. At this level the file is reviewed by a Board member who is not on the Executive Committee and who would make a recommendation to the full Board that would then make a decision on the appeal. Dr. Faulkner confirmed that Mr. Mihaly had not filed an appeal in the whole process related to his application for registration.

[114] Dr. Faulkner then testified about the National Professional Practice Examination. He said this was a required exam and must be passed by all applicants including applicants from the U of A, U.S., etc. He said that Mr. Mihaly had not passed the NPPE.

[115] Dr. Faulkner reviewed documents from Mr. Mihaly's file and testified as follows:

(a) Mr. Mihaly failed the NPPE when he wrote it on January 17, 2000; (Tab 10)

(b) Mr. Mihaly had applied to write the NPPE exam on October 16, 2000, but was absent for the test; (Tab 11)

(c) Mr. Mihaly was advised on June 29, 2001 that his file was being withdrawn because he had not done the examination specified in APEGGA's letter of February 11, 2000; (Tab 13)

(d) On May 31, 2002, (Tab 14) Mr. Mihaly asked APEGGA to reactivate his file because he was considering writing his NPPE on July 15, 2002. Mr. Mihaly was advised on June 3, 2002 (Tab 16) by APPEGA that his application had been reactivated so that he could write his NPPE. Mr. Mihaly failed the NPPE and was advised by letter dated August 8, 2002 (Tab 21) The letter stated that his performance was weak in certain areas and he was provided a comprehensive report to assist him to identify the weak areas in which he needed to improve.

(e) Mr. Mihaly again sat the NPPE on January 20, 2003 and failed; (Tab 22)

(f) On August 1, 2003, (Tab 24) Mr. Mihaly was advised by letter that his application was being withdrawn for a second time because he had not written the confirmatory exams which he was supposed to complete by May 2003;

(g) Mr. Mihaly asked for his file to be reactivated on October 3, 2006. (Tab 28) The file was reactivated and Mr. Mihaly was asked to send an updated resume and a list of references for individuals who APEGGA could contact. Mr. Mihaly provided an updated resume and the references.

[116] Dr. Faulkner then reviewed the Minutes of the Board of Examiners which included notes from previous meetings when Mr. Mihaly's file was considered by the Board. Mr. Mihaly's updated resume and the references he had provided were reviewed and the recommendation of the Board was that the file be reviewed by the full Experience Subcommittee of the Board of 25 members because they were not very clear about his level of work experience. The full Experience Subcommittee found that Mr. Mihaly's work was not at a D-level i.e work expected from a Professional Engineer but it was at a C-level which would be work at a technician level. The full Experience Subcommittee recommended that Mr. Mihaly write three confirmatory exams and the Engineering Economics exams or write the FE exam which was made available to

applicants at that time after APEGGA had made a rule change to allow applicants to write the FE exam instead of the confirmatory exams.

[117] Dr. Faulkner testified that sometime in 2005, APEGGA decided to provide an option to applicants to write the FE exam because it is an internationally accepted way of evaluating applicants and a tremendous amount of effort goes into it to make it consistent and is a better way of evaluating and confirming credentials of applicants. He said it is an eight-hour exam in two four-hour sessions which is available twice a year to write and costs about $150. He said graduates from the U.S. would have to write the FE exam and would require four years' of experience. A graduate from Slovakia on the FD List like Mr. Mihaly, would similarly have to do the FE exam, the NPPE and demonstrate four years' of experience. The individual on the FD List also has to show competency in the English language.

[118] Dr. Faulkner concluded his testimony by confirming that Mr. Mihaly did not attempt the confirmatory exams he was required to take nor did he take the FE exam or the NPPE.

[119] In cross-examination, Dr. Faulkner told Mr. Mihaly that his education was considered to be good and that is why his institution was on the FD List. He said getting onto the FD List was not a trivial matter, however, APEGGA's position was that Mr. Mihaly should confirm the education by doing the confirmatory examinations. Dr. Faulkner also testified that the full Experience Subcommittee considered all the references provided by Mr. Mihaly and he would have had to show the equivalent of 10 years of experience in order to have the exams waived.

C. Mr. Mark Tokarik

[120] Mr. Mark Tokarik obtained his Bachelor of Science in Engineering in 1981 and worked with Cambrian Engineering for about six years. He then attended law school and graduated with a Bachelor of Law in 1989. After working with a law firm for a few years, he joined APEGGA in 1999 as an Assistant Director of Registration and then became the Director of Registration. In September 2012, he was appointed as the Deputy Registrar for APEGGA.

[121] For 12 years as Director of Registration, he had overall responsibility for the registration process. He belonged to the National Engineering Admission Officials Group, a group of all of the Directors of Registration from every province. From 2006 to 2012, Mr. Tokarik was also a member of the Engineers Canada's Foreign Engineering Qualifications Committee (FEQC) which is a committee of Engineers Canada, an organization of the 12 provincial engineering associations. FEQC is responsible for maintaining the FD List and adding new institutions to the FD List. Mr. Tokarik was also a member of Engineers Canada's Admissions Issues Committee from 2010 to 2012 which is a subcommittee of the Canadian Engineering Qualifications Board (CEQB) which deals with issues that include discipline and continuing professional development. He was a member on Canadian delegations to China, Korea and Australia on matters related to the Canadian engineering licensure system.

[122] Mr. Tokarik testified that an individual who wants to be registered as a Professional Engineer in Alberta must meet six requirements which are: academic qualifications, experience, good character, English language competency, NPPE and either Canadian citizenship or permanent residency in Canada. If they are not Canadian citizens or permanent residents, they can still be registered as a foreign licensee, but have to meet the other five criteria to practice.

[123] Mr. Tokarik said that on the APEGGA website there is a specific section which addresses issues that may be faced by IEGs including registration requirements. The information on the website informs immigrants in Canada or potential immigrants thinking of emigrating to Canada about what is involved in getting registered as a Professional Engineer with APEGGA. The website also has eight embedded videos which explain various specific topics and contain specific brochures in PDF format that can be downloaded from the website.

[124] Mr. Tokarik testified that there are about 68,000 APEGGA members comprising professional members, members in training, examination candidates, student and professional licensees. He said APEGGA receives about 1,500 applications each year from IEGs and that about 60 per cent of these applicants are registered with no issues and do not have to write any confirmatory exams or the FE exam. They are considered to meet their four years' engineering experience of which one must be Canadian. These individuals, however, do have to write the NPPE regardless of whether they are Canadian or foreign trained Engineers. Mr. Tokarik stated that 25 per cent of the 1,500 applicants are assigned the FE exam or confirmatory exams, and may also require the one year Canadian experience. The remaining 15 per cent of the applicants have sufficient engineering experience to have their confirmatory examination waived, but they still have to obtain the one year required Canadian experience.

[125] He testified that an engineer who emigrates to Canada is free to commence working as an engineer upon arrival in Canada to commence accumulating the one year required Canadian experience. This has to be under the supervision and control of a licensed Professional Engineer, Geologist or Geoscientist. He confirmed that applicants do not have to be registered with APEGGA while they are working under the supervision of an engineer and this information can be found on the APEGGA website. He said generally 60 to 65 per cent of the applicants who apply for membership to APEGGA usually have already obtained the one year Canadian experience at the time of application. Mr. Tokarik said there was nothing that would have prevented Mr. Mihaly from obtaining the one-year Canadian experience if he could have found an employer who was prepared to employ him. He said APEGGA plays no role in whether a Professional Engineer can hire Mr. Mihaly nor would the employer have to get clearance from APEGGA to hire him. He stated that APEGGA did not interfere in any way with respect to Mr. Mihaly's search of employment.

[126] Mr. Tokarik testified that under s. 13(1)(c) of the EGPR, an applicant has to pass the NPPE prescribed by the Board of Examiners. He said it is not a technical exam. It is an exam that questions an individual's knowledge of law, ethics, professionalism, professional practice, professional responsibility, stamping requirements, accountability, document control and

management, an understanding of the Act, the regulations and bylaws, investigation and discipline procedures, corporate registration and general things a practicing engineer needs to be aware of. He said that APEGGA's website has a specific section which provides information on the NPPE. The information includes a syllabus of the exam contents which is broken down by topics, area and the percentage of the exam that relates to the topic area. It also has sample exam questions and there is a study kit that can be purchased from APEGGA for $200 which includes two textbooks. There are also guidelines for ethical practice and other miscellaneous study materials. He stated that the NPPE is offered four times a year and is a two-hour exam. It costs $140 now but in the year 2000 the cost was $50. The cost of the confirmatory exams now is $190 and in 2000 they were $80. He said the cost of the FE exam is $165 and the pass rate is 85 per cent and if a person does not pass, they can retake the exam. However, if the person has sat and passed the exam in another province and is transferring to Alberta, they are not required to write it again.

[127] Mr. Tokarik was asked about Mr. Mihaly's written submissions to the Tribunal stating that he had passed the NPPE on October 16, 2000. He testified that Mr. Mihaly was absent for the exam and he had confirmed this by reviewing a list of individuals on a spreadsheet who had written the NPPE on that day and Mr. Mihaly's name was not on the list. He said that APEGGA had also done an electronic search of its records for the letter Mr. Mihaly claimed was sent to him stating that he had passed the October 16, 2000 exam, but no such electronic record was found by APEGGA.

[128] Mr. Tokarik testified that the FE exam is prepared by a U.S. based organization called the National Council of Examiners for Engineering and Surveying (NCEES) together with U.S. state licensing boards. All U.S. applicants are required to pass the FE exam to become registered in the U.S. The FE exam is offered twice a year and is taken by approximately 20,000 people at each session. It is an eight-hour exam split in two sessions of four hours each to be taken in the morning and afternoon respectively. He said the morning exam covers the common fundamentals of engineering material learned in the first two years of a Canadian engineering program and the afternoon session covers the type of material that a Canadian student would learn in the third and fourth year in their field of specialization e.g. mechanical engineering. He said the FE exam is offered in six disciplines which are chemical, civil, electrical, environmental, industrial or mechanical. The FE exam is also used by other countries including Japan, South Korea, Egypt and Saudi Arabia. He stated that the NCEES is very particular about exam security and logistical arrangements, however, in Alberta it has granted APEGGA the authority to invigilate and offer the exam. He said Mr. Mihaly could have written this exam either in Calgary or Edmonton.

[129] Mr. Tokarik testified that an individual from a U.S.A. ABET accredited university applying for registration in Canada would be assigned the FE exam, but the Board of Examiner may waive the exam if the applicant has an acceptable Masters or Ph.D. degree in Engineering and certain conditions are met or on the basis of eight years' acceptable work experience.

[130] Mr. Tokarik said that an applicant from a university in Slovakia would first be assessed to determine if the institution is on the FD List. If the institution is on the FD List and the degree is in one of the following disciplines: chemical, civil, electrical, environmental, industrial or mechanical engineering, the applicant would be assigned the FE exam in their particular discipline. However, if the degree is in another discipline e.g. software, mining or petroleum, the applicant has the option to take the FE exam in one of the six disciplines or take three APEGGA confirmatory exams. The Board, after assigning the exams however, would still do an individual assessment of the applicant to determine if the exams can be waived. If the applicant has an acceptable Masters or a Ph.D. or 10 years of acceptable work experience, the Board would waive the exams assigned.

[131] Mr. Tokarik then gave evidence on the FD List. He said the FD List was originally created by Engineers Canada to provide a service to Canada Immigration as a part of the point system to assess the suitability of potential immigrants for emigration to Canada. He said it was developed in the early 1980s and was based on criteria that were established to give a sense of the university and the quality of the education offered at the university. It was an informal assessment. He said later the FD List was developed as a tool to evaluate foreign academic credentials as it is not practical to send visiting teams to every university in the world for accreditation visits, like it is done in Canada for the CEAB accreditation. He said the committee that is responsible for the FD List is the FEQC. The FD List is based on a paper review which considers documentation publicly available meaning "open source" information. This includes World University Handbooks and other information about the institution and the degrees that are offered at the institution. He said the FD List process does not look at particular engineering programs, but looks at the country and the universities within the country offering engineering degrees. He said in some cases there would be multiple levels of degrees offered but not all of them may be acceptable for inclusion in the FD List. He said the FD List provided a certain level of confidence in the quality of the education provided at the institution. He was very clear that the FD List was not used by APEGGA for immigration purposes, but it was used for registration purposes. He said there were 160 countries on the FD List which includes 3,000 institutions.

[132] Mr. Tokarik said if Mr. Mihaly had applied before 1999 when his institution was not included in the FD List, he would have been assigned nine exams. However, the Board has revised its policy over the years and now if an institution is not on the FD List, applicants are assigned the option to either take the FE exam or five confirmatory exams. He said if the institution is on the FD List, an applicant is assigned the FE exam and three confirmatory exams. The option to do the FE exam is offered in both cases because the Board of Examiners feel it provides a good measure to assess the applicant. Another difference if someone's degree is not on the FD List is that they are assigned the FE exam, but they would be required to have 12 years' of acceptable work experience rather than 10 years before the FE exam is waived. This is because there is less knowledge about the institution and less confidence and therefore applicants require more experience to support waiving the FE exam.

[133] Mr. Tokarik explained the significance of the CEAB Substantially Equivalent Program. He said some countries that do not have their own accreditation system or an MRA, their universities sometimes invite CEAB to visit to check the quality of their programs and do an accreditation review of their programs. CEAB then visits the institution and conducts an accreditation review similar to the one done for Canadian programs and if the program meets Canadian requirements then it is given Substantial Equivalent Status. He said there has been no such request from Slovakia or the Czech Republic for assessment of Equivalent Status nor have these countries applied to join the Washington Accord.

[134] Mr. Tokarik was then taken through evidence by respondent's counsel that related to Mr. Mihaly's application. He testified that Mr. Mihaly had sent an e-mail to APEGGA on June 19, 2002 suggesting that when he had applied for the first time in 1999 he was advised by APEGGA that his education was fully equivalent to North American professional experience. Mr. Tokarik said he wrote back to Mr. Mihaly on June 21, 2002 advising him that APEGGA had no record of sending such a letter and if he had such a letter with him he should send a copy to APEGGA. Mr. Tokarik also referred to notes from a telephone conversation of July 8, 2002 with Mr. Mihaly which stated that Mr. Tokarik had advised Mr. Mihaly about the Board of Examiners evaluation process. He said Mr. Mihaly told him that he had worked for 12 years at an international level and asked for the 10 years' work experience to be waived. He said that he told Mr. Mihaly that if he thought the Board had made a mistake, he should submit a reconsideration request with updated information to APEGGA. APEGGA also sent Mr. Mihaly a reconsideration and appeal sheet and APEGGA has confirmation on its file that it was successfully delivered to the fax number Mr. Mihaly had provided to him in his phone conversation on July 8, 2002. He said Mr. Mihaly did not submit a reconsideration request.

[135] Mr. Tokarik confirmed for respondent's counsel that having managed the system of registration at APEGGA, the place of origin of an applicant does not play a role in the registration process.

[136] In cross-examination, Mr. Mihaly raised the issue of the letter that he had received from APEGGA stating that he had passed the NPPE held on October 16, 2000 and which was signed by a Betty Lewis. Mr. Tokarik confirmed that a Betty Lewis had worked for APEGGA as an exam coordinator, but had retired.

[137] Mr. Mihaly also inquired in cross-examination as to how regularly the FD List was being updated. Mr. Tokarik stated that the FD List is updated regularly and the FEQC meets twice a year to consider new institutions to decide whether to include them on the FD List. Information on new institutions is normally received from potential applicants and if an institution is not on the FD List, Engineering Canada on behalf of the provincial associations, reviews the new information to decide if it should be included on the FD List. In response to questions from the Tribunal Chair, Mr. Tokarik explained that once a university is placed on the FD List and there is no updated information or concerns about the institution, it continues to remain on the FD List. He said Slovakia data was updated sometime after 1999 because there is a reference (Tab 35) on

the FD List that Slovakia signed the Bologna Accord in 1999. On further questioning by Mr. Mihaly, Mr. Tokarik said institutions for inclusion on the FD List are reviewed based on nine criteria of which two apply to the country.

[138] Mr. Mihaly asked Mr. Tokarik as to how his one-year Canadian experience was assessed by APEGGA after he provided an updated reference from a Professional Engineer he had worked for in Calgary. Mr. Tokarik said in 2007, Mr. Mihaly provided three additional references and the experience committee reviewed the updated experience information and at a separate meeting, the full experience committee considered his particular case and made the decision they did.

ANALYSIS

APEGGA Registration Standards

[139] The respondent entered into evidence a document prepared by Engineers Canada entitled *April 2010: List of Foreign Engineering Educational Institutions and Professionals Qualifications*. (Tab 35) This document states that provincial and territorial associations of Professional Engineers have the responsibility for the regulation of the practice of engineering in Canada. Each association has been established under an Act of the provincial or territorial legislatures and serves as the licensing authority for engineers practising within its jurisdiction. Engineers Canada is the national federation of these associations which coordinates the provincial and territorial associations to foster mutual recognition among the associations and to encourage the greatest possible commonality of operations in their licensing functions.

[140] APEGGA is responsible for licensure in Alberta. The two main components of licensure are academic qualifications and experience. When an IEG applies for licensure to APEGGA, they may initially be registered as an Examination Candidate like Mr. Mihaly. At this stage, the Board of Examiners may require the applicant to complete one or more confirmatory examinations to correct any perceived academic deficiency.[10]

[141] From a review of the applicable legislation and APEGGA's witnesses, an Examination Candidate can only transition from an Examination Candidate to a Professional Member category if he successfully writes and passes examinations assigned by APEGGA and obtains four years of experience as an engineer. As per APEGGA policy, one of these years of experience has to be in Canada. It is against the law for anyone to call themselves an Engineer or practise engineering in Canada unless they are registered as a member of an engineering licensing body. However, one can work in the engineering field under the direct supervision of a licensed Engineer while working towards their registration as a Professional Engineer.

[10] *Engineering and Geoscience Professions General Regulation, Alta. Reg. 150/1999, s. 8.*

[142] It should also be noted that in addition to this gate-keeping function at the time of registration, APEGGA also has various other statutory powers of investigation and discipline[11] that it could use to monitor the competency of engineers.

[143] The key principle used by APEGGA when determining whether one meets the academic requirement is: *Did the **content** of your **undergraduate** studies cover **substantially the syllabus of Canadian undergraduate studies** in the same **engineering/geoscience** field and was the quality of the program of studies at the level required for registration in Canada?* (Tab 32)

[144] APEGGA has adopted two different approaches when it assesses IEGs for licensure. It uses an *Accreditation Standard* with graduates from Canada and countries with which APEGGA has a MRA and an *Examination and Experience Standard* for graduates like Mr. Mihaly from other foreign countries, who was initially registered as an "examination candidate" pursuant to s. 13(1)(e)(iii).

A. Accreditation Standard

[145] The benchmark APEGGA uses for the Accreditation Standard is the accreditation process used within Canada by the CEAB for assessing Canadian engineering graduates.

[146] Dr. Lynch, in his evidence, described the elaborate nature of the accreditation process when the Faculty of Engineering at the U of A went through a renewal of its accreditation. Dr. Lynch was then the Dean of the Faculty and he dealt with the CEAB with respect to the accreditation process for the University. Dean Lynch stated that the approach during the accreditation process was a "weakest-link" approach meaning that if there was a single violation by any graduate in terms of meeting every requirement then accreditation is not granted to the school.

[147] Engineering graduates from universities which have been accredited by CEAB meet APEGGA's academic requirements for licensure. They are not required to take any further examinations except for the NPPE which must be passed by all applicants including applicants from the University of Alberta, U.S., etc. It is an exam that questions an individual's knowledge of law, ethics, professionalism, professional practice etc. and general things a practising engineer needs to be knowledgeable about.

[148] As indicated by the witnesses, APEGGA uses this CEAB Accreditation Standard to assess U.S. graduates and graduates from countries with which it has MRAs e.g. Washington Accord countries. The U.S. accreditation process, which is very similar to the Canadian accreditation process, is conducted in the U.S. by the U.S.A. Accreditation Board for Engineering and Technology (ABET) for U.S. schools. U.S. graduates from ABET-accredited schools are assigned the FE exam when they apply for licensure in Canada, however, if the applicant's background

[11] *Engineering and Geoscience Professions Act, R.S.A. 2000, c. E-11, Part 5* and *Engineering and Geoscience Professions General Regulation*, Alta. Reg. 150/1999, Part 6.

indicates eight years of progressively responsible technical experience or if they have a Masters or a Doctoral degree from a Canadian, U.S. or an institution with which APEGGA has a MRA, the FE exam is waived and the applicant is deemed to have met the academic requirements for licensure.

[149] The Washington Accord has 15 countries who are signatories to the accord. The Washington Accord is an agreement among the regulatory bodies of the countries that each other's accreditation processes are substantially equivalent and give substantially equivalent outcomes.

[150] New countries have to apply to join the Washington Accord and when an application is received, the country is initially granted provisional membership status to the Washington Accord. A team then reviews the regulatory and accreditation processes in the country to determine if the processes are substantially equivalent to that of Canada. The new country is only granted membership upon the unanimous agreement of all the signatories to the Washington Accord that the accreditation process in the applicant country is substantially equivalent to all the countries that belong to the Washington Accord. The country's membership status is reviewed every six years to ensure that they are maintaining the Accreditation standard. When a graduate from one of these countries applies to APEGGA for registration, APEGGA's approach for assessment is a "looking to exempt" approach. The applicant would only be required to write examinations if there was something unusual in their credentials.

[151] In 1990, Canada entered into an Agreement with France after determining that the accreditation processes of both countries were substantially similar to each other. The approach for applicants from France is also a "looking to exempt" approach. Examinations are only required of these graduates if there is something unusual in their credentials.

[152] In addition to the Washington Accord and the Agreement with France, CEAB also assesses engineering programs for institutions who invite CEAB to review their programs. The invitation is to determine if a particular program at the institution was substantially equivalent to an accredited program in Canada e.g. Universities of Costa Rica, University of Peru, etc. Compared to the Washington and France Accords, which are agreements between countries, in this case the Substantial Equivalency is an assessment of a particular program at the institution. Engineering graduates from these accredited programs are also assessed on a "looking to exempt" basis. Applicants are exempted from examinations unless something unusual is found in their credentials. This exemption appears to be allowed under s. 13 (1)(e)(iv).

B. Examination Standard

[153] All those IEGs like Mr. Mihaly who come from countries that have not entered into MRAs with APEGGA, are assessed by using the *Examination and Experience Standard.* These countries are mostly in Europe, Africa and Asia. As indicated by the witnesses, APEGGA utilizes a FD List developed by the CEQB which is a parallel board of the CEAB. The FD List is used by

the Board of Examiners when graduates from foreign institutions apply for registration. The educational institutions are evaluated through handbooks and other references.

[154] The FD List was originally developed by Engineers Canada in early 1980 as a service for Canada Immigration. It was an informal system of assessment of Engineers developed to assist Canada Immigration to assess the suitability of potential immigrants with some form of engineering qualifications to immigrate to Canada under the point system used by Canada Immigration. The FD List provided Canada Immigration a sense of the university and the quality of the education offered at the university from which the immigrant had obtained his education. Engineers Canada later made a decision to use the same FD List developed for Canada Immigration to evaluate foreign academic credentials. The committee that is responsible for developing and maintaining the FD List is the FEQC of Engineers Canada.

[155] Mr. Tokarik, in his evidence, explained that the evaluation of the university and the quality of the education offered is done by using available "open source" information on an institution and the degrees that are offered at the institution. When compiling the FD List the FEQC does not look at particular engineering programs at the university, but looks at the country and the universities within the country offering engineering degrees, together with the "open source" information available to determine if an institution should be included in the FD List. In some cases, there would be multiple levels of degrees offered in the country but not all of the institutions in the country may be acceptable for inclusion in the FD List.

[156] The "open source" information used to determine whether a foreign engineering educational institution meets established criteria comes from a variety of sources which include foreign government sources, educational institutions or handbooks such as the International Handbook of Universities, World of Learning, Commonwealth Universities Yearbook, Guide on Engineering Education in Europe and Directory of Engineering Education (UNESCO). The "open source" information on the institution and the country in which it is located is used to determine whether a foreign engineering educational institution is included in the FD List. The criteria which relate to the country which are taken into consideration are:

(a) whether there is more than one designation used in the country for engineering degrees, only those designations which are considered to be professional level qualifications within that country are included; and

(b) whether the educational system of the country was equivalent to 16 years of schooling of which three years are at the university level.

[157] The institutions within the country must meet a minimum of four of the following seven criteria to be included in the FD List:

(a) at least two different engineering programs are offered at the institution;
(b) the institution has been offering degree programs at the university level for 20 years;
(c) the overall student and teaching staff ratio is not more than 30:1;
(d) the institution's library has at least 100,000 volumes;
(e) the institution is a member of the International Association of Universities or the Association of Commonwealth Universities;
(f) the institution has higher engineering degree programs; and
(g) there is evidence of scholarly research activity in engineering.

[158] In the case of Mr. Mihaly, the Slovak Technical University in Bratislava which he attended merited inclusion on the FD List, but the Institute of Chemical Technology did not.

[159] The FD List is updated regularly, however, once a university is placed on the FD List it continues to remain on the FD List as long as there is no updated information available on the institution or there are no concerns about the institution. There are a total of 160 countries on the FD List.

[160] If an applicant's institution is on the FD List, APEGGA previously assigned three confirmatory exams plus a course/exam in Engineering Economics to the applicant. Recently, however, APEGGA has made a policy change and it now assigns only the FE exam to the candidates. After assigning the exams, APEGGA reviews the application and if the applicant has some other attributes like a Masters or a Doctoral degree in Engineering completed at a Canadian institution or in a country with which CEAB has a MRA, then APEGGA may consider waiving the examinations. The examinations may also be waived if the applicant has **10 years** of progressively responsible engineering experience acceptable to APEGGA.

[161] If an applicant's institution is not on the FD List, applicants were previously assigned five confirmatory examinations or now only the FE exam. However, APEGGA may waive the exams if applicants have a Masters or a Doctoral degree in Engineering completed at a Canadian institution or in a country with which CEAB has an MRA or if they have **12 years** of progressively responsible engineering work experience acceptable to APEGGA. APEGGA requires more years of experience from applicants not on the FD List because APEGGA has less

knowledge about the institution from where the foreign engineer graduated and less confidence and therefore applicants require more experience to support waiving the exams.

[162] As indicated above, APEGGA now assigns the FE exam to confirm the quality of an undergraduate engineering program. According to witnesses, APEGGA has moved to offer the FE exam to both FD List and non-FD List applicants because APEGGA concluded that the FE exam gave a very reliable confirmation of the quality of an undergraduate program.

[163] Finally, all applicants who want to practice in Alberta are required to also pass the NPPE before they are registered as Professional Engineers. This examination tests an applicant's knowledge about professionalism, ethics, practice, communication, legal system, Act, Regulation, discipline, etc.

[164] Although some type of examination appears to be mandated by statute, the NPPE and the FE are not specific requirements to achieving professional status as an engineer, under the legislation.

C. Experience Standard

[165] APEGGA also requires examination candidates like Mr. Mihaly who want to register as a Professional Engineer to have four years of experience as an engineer, of which one year must be experience in Canada. The Canadian experience component is not mandated by statute. Section 13(1)(e)(iii)(B) only requires four years of experience and reads as follows:

> *(B) has obtained at least 4 years of experience in work of an engineering or geoscientific nature that is acceptable to the Board of Examiners;*

[166] The stated purpose by APEGGA behind this requirement for Canadian experience is to ensure familiarity with Canadian codes and standards.

Prima Facie Case

[167] Mr. Mihaly was self-represented and had some difficulty articulating his arguments, however, he was able to convey to the Tribunal the challenges he faced in writing the confirmatory exams, the FE exam and meeting the one year Canadian experience requirement. Mr. Mihaly also communicated his emotions and frustration over the fact that he has been unable to work as an engineer in Canada and the effect this has had upon himself professionally and his family.

[168] Mr. Mihaly's complaint did not specifically allege discrimination as against all applicants with foreign credentials who apply to APEGGA for licensure. The complaint only alleged discrimination as it applied to him and that is what I shall consider, although my analysis may have some implications generally from a systemic perspective on APEGGA's processes for the

registration of IEGs. Mr. Mihaly alleges that requiring him to write the confirmatory exams initially and later the FE exam (after a policy change by APEGGA), constituted individual discrimination against him.

[169] In the human rights context, a complainant must first establish a *prima facie* case of discrimination. A *prima facie* case in this context is one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent.[12]

[170] The requirements of a *prima facie* case of discrimination were recently affirmed by the Supreme Court of Canada (SCC) in *Moore v. British Columbia*[13] in the area of services. In order to demonstrate *prima facie* discrimination:

> *... complainants are required to show that they have a characteristic protected from discrimination under the Code; that they experienced an adverse impact with respect to the service; and that the protected characteristic was a factor in the adverse impact.*

[171] As it relates to the first branch of the test, "place of origin" is a prohibited ground under the Act and there is no doubt that Mr. Mihaly is being treated as a foreign graduate because of the origin of his educational credentials, which, I have found, on these facts to be a proxy for place of origin under the Act. Mr. Mihaly is from the Czech Republic and Slovakia and obtained his educational qualifications in these countries.

[172] Mr. Mihaly has been adversely impacted through the process by which he and his foreign qualifications are considered for membership by APEGGA. Mr. Mihaly was required to successfully complete firstly the confirmatory exams and later the FE exam. These requirements were not applied to engineering graduates from Canada and those countries with which APEGGA has MRAs.

[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 APEGGA, underlying the examination and experience requirements is that engineers with qualifications from foreign countries with which APEGGA 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 APEGGA.

[174] As indicated above in *Moore*, *supra*, the third branch of the *prima facie* case requires only that a complainant must show that the "place of origin" was a "factor" in the adverse impact experienced by Mr. Mihaly. However, counsel for the respondent argued that differential

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[12] *Ontario (Human Rights Commission) v. Simpson Sears, 1985 CarswellOnt 887, [1985] 2 S.C.R. 536, at para. 28.*

[13] *Moore v. British Columbia (Ministry of Education), 2012 CarswellBC 3446, [2012] 3 S.C.R. 360, at para. 33.*

treatment could only be discriminatory if it is based upon stereotypical and arbitrary criteria that perpetuated disadvantage.

[175] I acknowledge that there appears to be some lack of clarity in the SCC jurisprudence about whether or not proof of stereotyping is an essential element of proof with respect to *prima facie* discrimination. In my view, the direction of the SCC in *British Columbia (Public Service Employee Relations Commission) v. B.C.G.E.U.*, [14]*(Meiorin)*, and later *Moore, supra,* do not seem to support that stereotyping or stigma must be shown, especially at the *prima facie* stage of the discrimination analysis. Abella J, in *Moore, supra* clearly sets out the test for *prima facie* discrimination in an adverse effect context without mentioning any additional element concerning proof of stereotyping. In that case, the cuts to the special education programs which adversely affected Mr. Moore, came about because of budget and not stereotyping. The case at hand appears very much like *Moore*, an adverse effect discrimination case, where there is impact but no intent to discriminate.

[176] I also note in *Pieters v. Peel Law Association,*[15] the Ontario Court of Appeal considered the issue of what is required to show prima facie discrimination and stated:

> *All that is required is that there be a "connection" between the adverse treatment and the ground of discrimination. The ground of discrimination must somehow be a "factor" in the adverse treatment.*

[177] The emphasis on stereotyping or perpetuation of disadvantage is much more prevalent in Charter cases where legislative deference must be considered warranting a much more rigorous analysis. Even so, in the recent section 15 Charter case of *Quebec (Attorney General) v. A*[16] there were a variety of opinions regarding whether or not stereotyping or perpetuation of disadvantage must be established prior to founding a breach of s. 15. A minority of the Court found that there was no breach of s. 15, however, a majority of the Court did find a breach but ultimately four members of this majority found that the breach was saved under section 1. Interestingly, Abella J. had this to say about the requirement for stereotyping:

> *[327] We must be careful not to treat Kapp and Withler as establishing an additional requirement on s. 15 claimants to prove that a distinction will perpetuate prejudicial or stereotypical attitudes towards them. Such an approach improperly focuses attention on whether a discriminatory attitude exists, not a discriminatory impact, contrary to Andrews, Kapp and Withler. In explaining prejudice in Withler, the Court said: "Without attempting to limit the factors that may be useful in assessing a claim of discrimination, it can be said that where the discriminatory effect is said to be the perpetuation of disadvantage or prejudice, evidence that goes to*

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[14] *British Columbia (Public Service Employee Relations Commission) v. B.C.G.E.U., (Meiorin) 1999 CarswellBC 1907, 3 S.C.R. 3.*

[15] *Pieters v. Peel Law Association, 2013 CarswellOnt 7881, 2013 ONCA 396, at para 59.*

[16] *Quebec (Attorney General) v. A, 2013 SCC 5.*

establishing a claimant's historical position of disadvantage or to demonstrating existing prejudice against the claimant group, as well as the nature of the interest that is affected, will be considered" (para. 38).

[328] It is the discriminatory conduct that s. 15 seeks to prevent, not the underlying attitude or motive, as Dickson C.J. explained in Action Travail:

> *It is not a question of whether this discrimination is motivated by an intentional desire to obstruct someone's potential, or whether it is the accidental by-product of innocently motivated practices or systems. If the barrier is affecting certain groups in a disproportionately negative way, it is a signal that the practices that lead to this adverse impact may be discriminatory. [p. 1139, citing the Report of the Commission on Equality in Employment (1984).]*

This was reiterated in Withler, where the Court said: "Whether the s. 15 analysis focuses on perpetuating disadvantage or stereotyping, the analysis involves looking at the circumstances of members of the group and the negative impact of the law on them" (para. 37 (emphasis added)).

[329] That was the lesson learned from the former "dignity" test from Law v. Canada (Minister of Employment and Immigration), [1999] 1 S.C.R. 497, which required claimants to establish that the impugned law had "the effect of perpetuating or promoting the view that the individual is less capable, or less worthy of recognition or value as a human being or as a member of Canadian society" (para. 51 (emphasis added)). In Kapp, this Court recognized that "dignity" was an underlying objective of the whole Charter, not a discrete and additional component of the equality test that the claimant had the burden of proving:

> *. . . human dignity is an abstract and subjective notion that . . . cannot only become confusing and difficult to apply; it has also proven to be an additional burden on equality claimants . . . .* [Emphasis in original; para. 22.]

Similarly, prejudice and stereotyping are neither separate elements of the Andrews test, nor categories into which a claim of discrimination must fit. A claimant need not prove that a law promotes negative attitudes, a largely unquantifiable burden.

[330] Requiring claimants, therefore, to prove that a distinction perpetuates negative attitudes about them imposes a largely irrelevant, not to mention ineffable burden.

[178] McLaughlin CJ agreed with Abella J with respect to the stereotyping issue and whether it was required:

> *[418] ...While the promotion or the perpetuation of prejudice, on the one hand, and false stereotyping, on the other, are useful guides, what constitutes discrimination requires a contextual analysis, taking into account matters such as pre-existing disadvantage of the claimant group, the degree of correspondence between the differential treatment and the claimant group's reality, the ameliorative impact or purpose of the law, and the nature of the interests affected. The issue of whether the law is discriminatory must be considered from the point of view of the reasonable person, dispassionate and fully apprised of the circumstances, possessed of similar attributes to, and under similar circumstances as, the claimant.*

[179] The three remaining judges in the majority with respect to whether there was a breach of section 1, agreed that there appeared to be no intention to stigmatize but the approach by the Quebec legislature perpetuated the disadvantage common law couples had historically experienced.

[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 that the imposition of policies to ensure competency and safety in professional fields may be necessary, the nature of certain policies imposed by APEGGA 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.

[181] I find that Mr. Mihaly, as an engineer who has obtained educational qualification in a foreign country and with which APEGGA does not have an MRA, has established a *prima facie* case that APEGGA discriminated against him in the area of services and membership in an occupational association, on the ground of place of origin.

[182] Once a *prima facie* case is established, the burden shifts to the respondent to justify the conduct or practice, "within the framework of the exemptions available under human rights statutes."[17] If it cannot be justified, discrimination will be found to occur.

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[17] *Meiorin, supra at para. 33*

APEGGA's Justification

[183] Section 11 of the Act states that a contravention 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".

[184] The respondent referred to the following factors as set out in *Meiorin, supra* and *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights),*[18] *(Grismer)* which require an employer, service provider or regulator to show 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 the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible (as further clarified in Hydro Quebec*[19]*) to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.*

[185] Counsel for APEGGA submitted that the objective and central purpose of APEGGA is to regulate the engineering profession to ensure public protection and APEGGA has adopted appropriate standards consistent with this purpose. These standards are not only rationally connected to that purpose, but are explicitly required under the *Engineering and Geoscience Professions Act* which requires IEGs to demonstrate that their qualifications are equivalent to Canadian graduates. Counsel also submitted under the second branch of *Meiorin,* that APEGGA had adopted the standard in good faith.

[186] Counsel further referred to the *Hydro-Quebec, supra* test when considering the third branch of the *Meiorin* test which suggests that the standard devised by APEGGA to achieve its purpose or goal must be reasonably necessary in the sense that APEGGA cannot accommodate persons with the characteristics of IEGs without undue hardship. Abella J stated the test for accommodation *Meiorin, supra* at para 16 as follows:

> *The test is not whether it was impossible for the employer to accommodate the employer's characteristics. The employer does not have a duty to*

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[18] *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights), (Grismer) [1999] S.C.J. No. 73.*

[19] *Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ), 2008 CarswellQue 6436, [2008] 2 S.C.R. 561.*

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.

[187] Counsel further submitted that individualized assessments of foreign professionals' qualifications occurs and constitutes reasonable accommodation because APEGGA's registration system is not based upon the assumption that the Canadian engineering education system is better, but is based upon research and the evaluation of foreign educational programs. Counsel indicated that APEGGA conducts an individualized assessment that allows IEGs to demonstrate that their education or experience meets APEGGA's requirements. I shall consider these arguments in the discussion to follow.

Application of *Meiorin* and *Grismer* Analysis

A. <u>What are the standards at issue?</u>

[188] APEGGA has a statutory responsibility to assess the competency of applicants to practise engineering in Alberta. While there appears to be some discretion allowed the Board of Examiners as to what category an applicant is placed in, Mr. Mihaly was admitted by APEGGA as an "Examination Candidate" pursuant to Section 8 of the EGPR which states as follows:

> *A person who meets the following requirements and applies to the Registrar for registration is entitled to be admitted as an <u>examination candidate</u>:*
>
> *(a) the applicant is of good character and reputation;*
> *(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 <u>the purpose of correcting a perceived academic deficiency</u>.*[Emphasis added]

[189] Mr. Mihaly had graduated from a "related academic program" and would have been registered as a Professional Engineer if he had satisfied the requirements in **s. 13(1)(e)(iii)** of the EGPR which reads as follows:

> *(iii) the applicant is admitted as an examination candidate and*
>
> *(A) has completed the examinations referred to in section 8(b), and*
> *(B) has obtained at least 4 years of experience in work of an engineering or geoscientific nature that is acceptable to the Board of Examiners;*

[190] Mr. Mihaly was initially assigned three confirmatory exams by APEGGA and later the FE exam because the Slovak University of Technology was on the FD List. In addition to completing these exams, Mr. Mihaly was also required to complete the NPPE which would have tested his knowledge about professionalism, ethics, legal systems, practice, regulation, discipline etc. The requirement to pass the confirmatory exams, the FE exam and the NPPE are referred to as the *Examination Standard* in this discussion. The requirement of four years of experience, including one year of Canadian experience, will be referred to as the *Experience Standard.*

B. Were the standards, specifically the *Examination Standard* and the *Experience Standard*, adopted for a purpose or goal that is rationally connected to the function being performed?

[191] APEGGA's function is to assess the competency of engineers to practise engineering in Alberta. APEGGA performs this function pursuant to its statutory authority and with the goal that the public is protected when engineers practise their profession in Alberta. The purpose of the processes and standards used by APEGGA is to assess the educational qualifications and the experience of international engineers, such as Mr. Mihaly, in order to satisfy itself that an international engineer registered in Alberta will be able to competently and safely practise engineering. I find that the goal of safety and the protection of the public from harm achieved through the evaluation of foreign credentials by APEGGA using the *Examination Standard* and the *Experience Standard* were adopted for safety and competency reasons and both of these purposes are rationally connected to the function performed by APEGGA.

C. Were the standards adopted in good faith?

[192] APEGGA has the statutory responsibility for the registration of international engineers to assure itself of their competency to practise in Alberta without causing harm to the public. I find that the *Examination Standard* and the *Experience Standard* were adopted by APEGGA in good faith.

D. Were the standards reasonably necessary to accomplish its purpose or goal?

[193] APEGGA's third and final hurdle is to demonstrate that the standards used are reasonably necessary for the accomplishment of the general purpose, which is that the public is protected and that the IEGs perform competently. At this stage, the analysis shifts from the general purpose of the Standards to the particular Standards.

[194] The Court in *Meiorin, supra* outlined the following questions[20] that may be asked in the course of the analysis:

[20] *Meiorin,* supra at para. 65.

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?*

[195] The Court further went on to emphasize the importance of procedural accommodation[21] :

> *Notwithstanding the overlap between the two inquiries, it may often be useful as a practical matter to consider separately, first, the procedure, if any, which was adopted to assess the issue of accommodation and, second, the substantive content of either a more accommodating standard which was offered or alternatively the employer's reasons for not offering any such standard: see generally Lepofsky, supra.*

[196] On the issue of process see also *Moore, supra* where Abella J noted[22] that the failure to consider other alternatives and options in the accommodation process seriously undermined the justification put forward by the Ministry of Education for the discrimination.

(a) Examination Standard

[197] There are two components that must be considered to analyze whether the *Examination Standard* is reasonably necessary to accomplish APEGGA's purpose:

[21] *Meiorin supra, para. 66.*
[22] *Moore, supra at para. 52.*

(i) Foreign Degree List (FD List)

[198] Mr. Tokarik testified that the FD List was originally created by Engineers Canada to provide a service to Canada Immigration as a part of its point system to assess the suitability of Engineers immigrating to Canada. He said the committee that is responsible for the FD List is the FEQC. The FD List was developed in early 1980s and was based on criteria that were established to provide Canada Immigration a sense of the university and the quality of the education offered at the university. It was an informal assessment tool. He said later the FD List was recommended to APEGGA for use to evaluate foreign academic credentials.

[199] The process to select institutions for the FD List is by conducting what witnesses referred to as an "open source" review of information on institutions in countries that offer engineering programs. Mr. Tokarik testified that the FD List is based on a paper review which takes into consideration documentation publicly available. This material includes World University Handbooks and other information about the institution and the degrees that are offered at the institution. This review is not through an Accreditation process, but through a review of the calendars of universities, colleges, etc., and other publicly available information on the institution with respect to programs that appear to be engineering programs. The FD List thus prepared is used by the Board of Examiners of APEGGA when graduates from foreign institutions, which are not part of an MRA or have not been rated to be CEAB Substantially Equivalent Program, apply for registration. He said the FD List process does not look at particular engineering programs at the institution and assess them. It looks at the country and the universities within the country offering engineering degrees[23]. Mr. Tokarik said in some cases there would be multiple levels of degrees offered at an institution but not all of them may be acceptable for inclusion in the FD List. He said the FD List provided a certain level of confidence in the quality of the education provided at the institution. APEGGA uses this information together with the country and institution criteria previously noted to decide whether an institution should be included in the FD List. Institutions for which "open source" information is not available, do not make it on to this FD List and are treated differently.

[200] I want to emphasize that the decision on whether to include an institution on the FD List is, for the most part, dependent upon the "open source" information generally available. There was no evidence to suggest that there was any direct consultation or interaction with the institutions in the country themselves in order to determine the quality and content of their engineering programs.

[201] In my view, this process, which relies mostly upon secondary sources of information and global criteria, is a poor substitute for directly assessing the education of IEGs who come from many different countries. Such an assessment has the potential for significant inaccuracies and has very significant effects on foreign trained engineers. It is not sufficient as a measurement or assessment tool of an applicant's knowledge and skill to decide what is required "to correct a

[23] This further supports the argument that the FD List is based on the ground "place of origin."

perceived deficiency" as set out under the legislation. Institutions, for which enough "open source" information is not available, are at a very significant disadvantage in this process. Some schools in Africa and Asia that operate on tight budgets and from which countries many of Canada's recent immigrants come from, may not have the wherewithal to create and make available "open source" information which would present a profile of their institution that APEGGA could access. This, however, should not lead to the conclusion that their engineering programs are not designed to graduate competent engineers. It simply means that information on these institutions is not available for use by APEGGA.

[202] It is incumbent upon APEGGA as a gate-keeper of registration of foreign engineers in Alberta to use current, reliable and more detailed information on institutions rather than relying on secondary "open source" information. Such a crucial categorization of qualifications should not be based on secondary "open source" information using a tool which was originally developed for immigration purposes. APEGGA's decisions affect the careers and lives of many professionals and their families immigrating to Canada. Advances in technology and the ease of present day electronic communication offer the option to acquire more detailed, current and refined information on specific engineering programs directly in consultation with the institutions themselves, especially with those institutions in countries from which Canada receives its immigrants. This can be achieved without the investment of an inordinate number of hours and at a minimal cost for an organization that has 68,000 dues paying members. Mr. Tokarik also testified that once a university is on the FD List it continues to remain there unless there are some concerns about the university itself. This raises an issue about the currency of the information on universities on the FD List at any given point in time.

[203] While there was limited evidence before me from APEGGA as to other alternatives to using "open source" information to categorize applicants, one possible alternative that comes to mind is for APEGGA to 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. While these agreements may not meet the full standards of Accreditation like the MRA's, there would, at the very least, be a mutual sharing of information which would assist in APEGGA having a more fulsome understanding of the credentials of the engineers coming from these countries. Further, many of the countries both on and off the FD List are not in a position to initiate contact with APEGGA and invite them to come and assess their engineering programs. Many of these countries and their local professional engineering association may not have reached the level of sophistication to contact APEGGA or have the resources to initiate the process. In some cases, the countries themselves discourage such contact to avoid the brain drain of its educated professionals to Canada. It is therefore not unreasonable to expect that APEGGA initiate contact with such countries to obtain more reliable data. This will also allow APEGGA, as Dean Lynch indicated in his evidence, to promote the APEGGA brand of Accreditation internationally.

[204] Mr. Mihaly explained in his written submissions that the Faculty of Chemical and Food Technology at the Slovak University is one of seven faculties at the university and dates back to

1939. The faculty has educated 16,700 graduates and has trained 1,300 post-doctorate graduates. The faculty at this institution occupies a very special position in the Slovak Republic. The first level of Bachelor of Science courses at the Slovak University are taught over three years and at the end of the course, students have to sit a state examination and complete a "semester project." The Masters of Science course of studies ends with a state examination and the student has to defend a diploma thesis.

[205] Mr. Mihaly also described the Institute of Chemical Technology (ICT) in Prague as the biggest educational institution of its kind in Central Europe with a tradition of almost 200 years. He said it "offers a prospect of a prestigious and highly remunerative professional career both in the Czech Republic and abroad." I make no findings regarding whether or not the representations by Mr. Mihaly concerning the institutions are indeed correct. My point is that APEGGA did not initiate or contact these institutions or make efforts to ascertain a fuller understanding of the program that Mr. Mihaly undertook at these institutions.

[206] The categorization of Mr. Mihaly based on "open source" information without a more meaningful and thorough individual assessment of his education credentials, is problematic. APEGGA has not shown that it has explored options and alternatives to the categorization process based on "open source" information, and accommodated Mr. Mihaly to the point of undue hardship.

(ii) Examinations

Fundamentals of Engineering Examination.

[207] Dr. Faulkner testified that confirmatory exams are used for quite a large number of differing educational backgrounds from different countries. He said confirmatory exams were developed to cover the subject matter that APEGGA would expect to see in someone who has graduated from a Canadian Accredited program and that these exams are developed by individuals at the University of Alberta or the University of Calgary. Previously, APEGGA used to assign three confirmatory exams to those foreign graduates whose institutions were on the FD List or five exams to those graduates who graduated from institutions that did not make it on to the FD List.

[208] Now APEGGA, as Dean Lynch testified in his evidence, increasingly prefers to use the Fundamentals of Engineering exam to confirm the quality of an undergraduate engineering program for foreign engineers. After a detailed study, APEGGA concluded that it should move to use the FE exam as an instrument because it provided very reliable confirmation of the quality of an undergraduate engineering program.

[209] The FE exam is of American origin and is set at the U.S. accreditation standard which is considered equivalent to the Canadian Accreditation Standard. This exam is set by a group in the U.S. called the NCEES and APEGGA has been granted the authority by NCEES to invigilate and offer the exam in Alberta. It is used by APEGGA as a proxy to measure the education of foreign

engineers. Mr. Tokarik explained that the FE exam is offered twice a year and is an eight-hour exam split in two sessions of four hours each to be taken in the morning and afternoon respectively. He said the morning exam covers the common fundamentals of engineering material learned in the first two years of a Canadian engineering program and the afternoon session covers the type of material that a Canadian student would learn in the third and fourth year in their field of specialization. This examination tests an IEG's knowledge in all areas in one exam and if the IEG cannot successfully complete this one exam, they can never practise as professional engineers in Alberta.

[210] The standard underlying the FE exam, which IEGs are required to pass, is actually the Accreditation Standard discussed above used for assessing graduates of Canadian engineering schools or those graduates with which APEGGA has MRAs. Although the standard looks different on its face, what the IEGs actually have to demonstrate through passing the FE exam is that their education, obtained in a foreign jurisdiction, is of the same accredited standard as the education received by any Canadian engineering graduate. The FE exam parallels the Canadian Accreditation standard. IEGs are expected to demonstrate that their education is at par with a Canadian graduate.

[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 consideration 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 APEGGA 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 IEG may be able to complete tasks expected of engineers with reasonable safety and competency.

[212] The onus is upon APEGGA to show that the *Examination Standard* using the confirmatory exams or the FE exam to assess safety and competency is reasonably necessary and that it has explored options and alternatives and incorporated accommodation for foreign engineers in its processes to the point of undue hardship.

Section 8 of the EPGR states as follows:

> *A person who meets the following requirements and applies to the Registrar for registration is entitled to be admitted as an examination candidate:*
>
> *(a) the applicant is of good character and reputation;*
>
> *(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." [Emphasis added]

[213] According to this section, APEGGA is required under the statute to take a curative approach with the "purpose of correcting a perceived academic deficiency" in an applicant.

[214] Counsel submitted in his arguments that APEGGA conducts an individualized assessment that allows IEGs to demonstrate that their education and experience meets APEGGA's requirements. Counsel here is referring to the review by the Executive Committee and APEGGA's Board of Examiners of the transcripts and other documents provided by the applicant as the "individualized assessment." Dr. Faulkner, who is on APEGGA's Board of Examiners, in his evidence also made reference to this particular process. He explained that an application is reviewed by the Executive Committee for two components, one of which is education and the other is experience. The educational qualifications are assessed by the academic examiners and the experience of the applicant is assessed by the experience examiners on the Executive Committee. The assessment then comes back to the Board for discussion and a decision.

[215] What happens at this stage, however, in my respectful view, cannot be referred to as meaningful "individualized assessment" of an engineer's skills and experience. The evidence indicates that this assessment is essentially a review of documents to determine what engineering discipline the applicant would fall under so that APEGGA can assign the exams from the appropriate group of exams related to that particular discipline. It is not "for the purpose of correcting a perceived academic deficiency" as required under the Regulation in section 8. In fact at this stage, APEGGA only has before it the transcripts, resume, reference questionnaires, etc., which provide some understanding of the applicant's background, but not a fulsome understanding of the IEG's knowledge and competency. This categorization process does not take into consideration whether an IEG with their education and experience would be able to practise safely and competently as an engineer or what they are potentially able to contribute to the profession without having to sit one size fits all examinations.

[216] I acknowledge that APEGGA may, after the above review, decide to waive exams, but this is on very narrow grounds. The evidence indicated that exams are waived if a foreign engineer has a Masters or a Doctorate degree from a Canadian institution or from a country with which APEGGA has a MRA or if the IEG has 10 years (12 years if not on the FD List) of progressively responsible engineering experience. APEGGA requires the experience to be of increasing responsibility and complexity. Obtaining a waiver under these grounds, however, is quite difficult for most foreign engineers because when they come to Canada they usually come early in their careers to start a new life unless they have come to Canada to pursue post-graduate studies.

[217] The Board reviewed Mr. Mihaly's qualifications initially in January 2000 when Mr. Mihaly first applied and later again in August 2007 after Mr. Mihaly complained and requested a waiver

because he had more than 10 years of experience and some Canadian experience. In both these reviews, however, the consideration was over examinations. In January 2000, it was to determine what examinations should be assigned and in 2007, it was to decide whether the examinations could be waived. The purpose of these reviews was not to identify a deficiency in Mr. Mihaly's academic credentials so that recommendations could be made to him to cure or correct any perceived deficiency in his knowledge and/or training. I do not find this to be an individual assessment of knowledge and experience with a view to correcting any deficiency.

[218] APEGGA has not adopted the legislative directive of "correcting a perceived academic deficiency" approach. It does not determine academic deficiency before assigning exams. It simply assigns IEGS the FE exam (or previously confirmatory exams). The wording of the statute implies that each applicant's knowledge and experience would be assessed to determine the areas of deficiency, and then specific interventions would be assigned to bring the IEGs up to a level which would allow them to practise competently and reasonably safely in Alberta. An integrative approach is contemplated under the statute.

[219] Justice McLachlin in *Meiorin, supra* required courts and tribunals to be sensitive to the various ways in which an individual can contribute and may be accommodated. In her judgement she stated[24]:

> *Courts and tribunals should be sensitive to the various ways in which individual capabilities may be accommodated. Apart from individual testing to determine whether the person has the aptitude or qualification that is necessary to perform the work, the possibility that there may be different ways to perform the job while still accomplishing the employer's legitimate work-related purpose should be considered in appropriate cases. The skills, capabilities, and potential contributions of the individual claimant and others like him or her must be respected as much as possible. Employers, courts and tribunals should be innovative yet practical when considering how this may best be done in particular circumstances.*

National Professional Practice Examination

[220] Another examination which Mr. Mihaly was required to take was the National Professional Practice Exam (NPPE). The statutory mandate for this type of exam can be found in S.13(1)(iii)(c) of the EGPR which reads as follows:

> *(c) the applicant has a knowledge of the Act and the regulations under the Act, and general knowledge related to the practice of engineering or geoscience, which has been demonstrated by passing an examination that is prescribed by the Board of Examiners;*

[24] *Meiorin, supra at para. 64.*

[221] Mr. Tokarik explained that this exam tests knowledge of law, ethics, professionalism, professional practice, professional responsibility, stamping requirements, understanding the Act, Regulations etc. APEGGA's website[25] lists the following major subject areas that are included in the NPPE: Professionalism, Ethics, Professional Practice, Communication, Law for Professional Practice, Professional Law and, Regulation & Disciplinary Processes. Some of the subjects covered in this exam are the Roles and Responsibilities of professionals in society, Statutory and Non-Statutory Statutes and Codes of Practice, Whistle blowing, the Canadian Legal System, Construction Liens, etc. A detailed list of the areas covered can be found on the website.

[222] Mr. Mihaly took the NPPE exam three times and failed. Other than a study kit, there was no evidence to suggest that APEGGA explored any alternatives or options to the exam or offered any courses or instructions to assist the applicants to prepare for this exam. The subjects in this exam are varied and new for a foreign engineer arrived in Canada. Mr. Mihaly would likely require more assistance and preparation to successfully complete this exam. When Mr. Mihaly failed his NPPE on July 15, 2002, APEGGA advised by way of a letter dated August 8, 2002 that, "where your performance was weak you require a better understanding of the material," and "We suggest that in preparing for the next examination, you focus on improving your knowledge and comprehension of those areas in which you obtained as score of six (6) or lower." This was the extent of APEGGA's individual assistance to Mr. Mihaly to pass the NPPE. Subjects included in this exam like the Canadian Legal System, Expert Witness etc., may have required specific direction, mentorship and preparation to understand the concepts set within the context of engineering.

[223] The approach here is again a one size fits all approach like that taken with the FE exam. This approach is particularly unhelpful to foreign trained engineers who need assistance in understanding the APEGGA process and its requirements.

[224] The statute does not mention the NPPE exam specifically. It only mentions an "examination that is prescribed by the Board of Examiners." APEGGA, therefore, can consider alternative options with respect to this exam. For example, it could restructure this exam into specific knowledge modules so applicants can understand and study for each subject area before sitting for the exam. Another option that may be considered is for APEGGA to provide some sort of interim licensure allowing the engineer to take the NPPE after gaining a few years of practical experience. Again, it seems to me that there are options within the structure of the legislation, however, APEGGA has not explored these options but rather has implemented a one size fits all approach, especially for candidates categorized as Examination Candidates, such as Mr. Mihaly.

(iii) *Meiorin* Questions

[225] I now want to specifically consider some of the questions that the Court in *Meiorin*, *supra* recommended, when engaging in the justification analysis:

[25] http://www.apega.ca/applicants/pdf/Examinations/ScopeandSyllabus.pdf.

Has APEGGA investigated alternative approaches that do not have a discriminatory effect, such as individual testing against a more individually sensitive standard?

[226] There was little evidence before me to support that APEGGA had investigated alternative approaches that took into consideration individual testing of IEGs against a more individually sensitive standard. Presently, an IEG applying for registration in Alberta who is registered as an "Examination Candidate" does not have any alternatives. He or she must write the examinations, specifically the Fundamentals of Engineering exam and the NPPE prescribed by APEGGA and if they are unsuccessful, they cannot advance professionally. This process of registration does not accommodate IEGs coming from all over the world with varying backgrounds to Canada only to discover that once they arrive in Canada, they will not be able to practise as engineers unless they pass the examinations.

[227] APEGGA must explore other ways to evaluate IEGs which are less discriminatory and which would allow IEGs to accomplish APEGGA's legitimate purpose, which is to have engineers practise in a competent and reasonably safe manner. Accommodation should look at these IEGs in a holistic way and in an integrative manner so that IEGs can continue to make the same contribution as engineers in Canada which they were making in their own countries.

[228] The present approach of APEGGA does not put a priority on accommodation, rather it places barriers that have to be surmounted by IEGS before they can practise engineering in Alberta. One size fits all examinations are not the only means for APEGGA to ensure competency and safety. Individual assessment could be undertaken and measures implemented which would support and assist IEGS prior to them writing specific examinations. APEGGA also has, along with its gate-keeping function, various other statutory powers like disciplining, investigating etc. that could further ensure its overall statutory objective to protect the public.

[229] I also note that APEGGA has the discretion under s. 13(1)(e)(iv) of the EGPR to register an IEG as a professional engineer if their academic qualifications and experience are acceptable to the Board of Examiners. In the case of Mr. Mihaly, the Board apparently could not exercise this discretion because it only had before it Mr. Mihaly's transcripts, reference questionnaires, etc., resulting in Mr. Mihaly being then slated into the "examination candidate" stream. I acknowledge that when Mr. Mihaly complained, several Board Examiners did once again review Mr. Mihaly's application. However, no one sat down with Mr. Mihaly or contacted his universities directly to review his qualifications more directly. Most of the interaction with Mr. Mihaly was by way of correspondence and e-mail. The process undertaken by the Board was not meaningful "individual assessment."

[230] Dr. Lynch in his evidence described some of the challenges faced by the engineering profession in Canada with respect to the assessment of credentials. He said there is a large number of IEGs applying for licensure in Alberta and Ontario. Tokarik provided evidence on the number

of applications APEGGA has to deal with annually. Mr. Tokarik testified that there are about 68,000 APEGGA members comprising professional members, members in training, examination candidates, student and professional licensees. He said APEGGA receives about 1,500 applications each year from IEGs and that about 60 per cent of these applicants are registered with no issues and do not have to write any confirmatory exams or the FE exam. They are considered to meet their four years engineering experience of which one must be Canadian. These individuals, however, do have to write the NPPE regardless of whether they are Canadian or foreign trained engineers. Mr. Tokarik stated that 25 per cent of the 1,500 applicants are assigned the FE exam or confirmatory exams and may also require the one year Canadian experience. The remaining 15 per cent of the applicants have sufficient engineering experience to have their confirmatory examination waived, but they still have to obtain the one year required Canadian experience.

[231] Based on the above evidence that APEGGA receives 1,500 applications from IEGs and that only 25 per cent need individual consideration, it would amount to 375 IEG applications for individual consideration every year. This in my view is not a prohibitive number for a large organization like APEGGA which has a very large Board of Examiners and an equally large Sub Committee, which undertakes evaluation of qualifications. APEGGA, in conjunction with Engineers Canada, the federation of provincial engineering associations, has many members with a lot of experience. Investing time and money to come up with a better way to assess applicants on an individual basis would not cause undue hardship to the engineering profession nor does it appear to be cost prohibitive with all the dues-paying members.

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?

[232] As discussed above, the expectation to have all IEGs come up to the Accreditation Standard by doing the FE exam and the NPPE does not recognize that through individual assessment, there may be other ways to properly assess IEG's ability to practice safely and competently.

Is there a way to do the job that is less discriminatory while still accomplishing the employer's legitimate purpose?

[233] While there was little evidence before me that APEGGA explored other options or alternatives to the FE exam, one option APEGGA could pursue is to conduct personal interviews to review transcripts, questionnaires, experience and any other material the IEG can provide in order to assess strengths and weaknesses with a view to identifying deficiencies. In parallel, APEGGA could consider some type of transition program in partnership with local universities which would allow the IEGS to enroll in programs or courses to cure the deficiencies indentified

by APEGGA. Another option that may be worthy of consideration is using a modular approach to testing the competency of IEGs. A modular approach would allow an IEG to transition from one level to another in stages by completing different knowledge modules. IEGs could attend classes offered (or partnered) by APEGGA through universities and colleges while being employed or matched by engineering companies. This would provide an ideal option to a new immigrant who can start obtaining practical experience and possibly an income as soon as they arrive in Canada. It would gradually allow them to progress through the modules and upgrade their knowledge at their own pace to the Canadian Accreditation level. This type of modular approach could be offered as an alternative to examinations in recognition of the importance of individual assessment and that a one size fits all examination approach is difficult for many IEGs.

[234] The *Examination Standard*, when analyzed against the questions the SCC has recommended exploring in *Meiorin*, is not justified. APEGGA has not demonstrated that the *Examination Standard* or a one size fits all approach through examination requirements is reasonably necessary to accomplish APEGGA's legitimate goal of assessing the ability of engineers to practice safely and competently in Canada. APEGGA has not shown that it has properly considered alternatives or that it would suffer undue hardship by exploring or implementing alternatives to the *Examination Standard.*

(b) Experience Standard

[235] With respect to the one-year requirement of Canadian experience, Dr. Faulkner, in his evidence, stated that to be registered as an Engineer in Alberta, one must have four years of experience of which one year must be Canadian. The statute under s.13 (1)(iii)(B) of the EGPR, however, only states "4 years of experience" and there is no explicit reference to "Canadian" experience. It appears that the one year Canadian experience requirement is APEGGA policy.

[236] As stated by APEGGA, the purpose behind the one year 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. Mr. Tokarik testified that an engineer who immigrates to Canada is free to commence working as an engineer upon arrival in Canada and to start accumulating the one year required Canadian experience. This work has to be under the supervision and control of a licensed professional engineer, geologist or geoscientist. Mr. Tokarik further testified that there was nothing that would have prevented Mr. Mihaly from obtaining the one-year Canadian experience if he could have found an employer who was prepared to employ him. He said APEGGA plays no role in whether a Professional Engineer can hire Mr. Mihaly nor would the employer have to get clearance from APEGGA to hire him. He stated that APEGGA did not interfere in any way with respect to Mr. Mihaly's search of employment.

[237] I acknowledge that such experience would go to familiarize a foreign engineer about Canadian codes, practices etc., however APEGGA has not taken into consideration the serious challenges foreign professionals experience when looking for employment in the engineering

field when the applicant is not a professional engineer or otherwise. Mr. Mihaly in his written submissions stated that it was difficult for him to get a job without APEGGA registration as a Professional Engineer. He said that he has sent 2000 job applications in the last two years and he received five responses and two interviews. He stated that engineering firms usually refuse to hire engineers with more than six years' experience in junior positions.

[238] Again, there was little evidence put forward by APEGGA regarding any exploration of other options for APEGGA to satisfy itself of other ways that IEG's could achieve sufficient knowledge of Canadian legislation, work codes, etc. However, some options that come to mind include APEGGA recruiting volunteer mentors or assisting the IEGS in their job search by organizing practicums or training programs or a match program. These options would provide the IEGs an opportunity to integrate and become familiar with Canadian practices while they are gradually building on their knowledge base to bring it up to the Accreditation level.

[239] Accommodation for foreign-trained engineers seeking to meet a professional requirement of "Canadian experience" is crucial. Foreign-trained engineers face difficulties when seeking employment in Canada because they do not have any prior Canadian experience. It potentially lends to the exploitation of these foreign professionals who, under pressure to obtain an income to provide for their families, usually end up accepting low-paying jobs in engineering firms or elsewhere to make ends meet and trying to satisfy APEGGA's requirements. This is a real issue for new Canadians and I take notice of this fact. Tales of engineers and PhDs driving taxis in Canada abound in immigrant communities. APEGGA should recognize the challenge IEGs face upon arrival in Canada when seeking employment. APEGGA cannot continue to have a hands off approach towards these IEGs who are seeking employment in engineering.

[240] For the reasons outlined above, I find that the standards used by APEGGA cannot be justified under step 3 of the *Meiorin/Grismer* analysis.

(c) Conclusion

[241] I am cognizant of the statutory framework of APEGGA and its statutory and public responsibility to satisfy itself as to the fitness and competency of applicants, especially in the context of foreign engineering graduates who apply for registration. However, this role must take into consideration the effects of the processes and standards on new immigrants who come to Canada with so much hope and promise and who, upon arrival have serious difficulty meeting certain requirements imposed by professional bodies. It is the effect of such processes to which McIntyre J. was referring to in *Andrews v. Law Society (British Columbia)*[26] when he said that:

> *...discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations*

[26] *Andrews v. Law Society (British Columbia),1989 CarswellBC 16, [1989] 1 S.C.R. 143, at para. 33.*

or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits and advantages available to other members of society.

[242] For the reasons detailed above, I find that Mr. Mihaly has succeeded in establishing that the *Examination Standard* and the *Experience Standard* used by APEGGA to assess his educational credentials, without more individualized assessment or exploration of other options, constitutes discrimination which cannot be justified under the Act.

REMEDY

The Act provides as follows:

32(1) A human rights tribunal

(a) shall, if it finds that a complaint is without merit, order that the complaint be dismissed, and

(b) may, if it finds that a complaint has merit in whole or in part, order the person against whom the finding was made to do any or all of the following:

(i) to cease the contravention complained of;

(ii) to refrain in the future from committing the same or any similar contravention;

(iii) to make available to the person dealt with contrary to this Act the rights, opportunities or privileges that person was denied contrary to this Act;

(iv) to compensate the person dealt with contrary to this Act for all or any part of any wages or income lost or expenses incurred by reason of the contravention of this Act;

(v) to take any other action the tribunal considers proper to place the person dealt with contrary to this Act in the position the person would have been in but for the contravention of this Act.

(2) A human rights tribunal may make any order as to costs that it considers appropriate.

(3) A human rights tribunal shall serve a copy of its decision, including the findings of fact on which the decision was based and the reasons for the decision, on the parties to the proceeding.

[243] There were no formal submissions made on the issue of remedies before me, however, Mr. Mihaly in his complaint and written submissions made reference to the possible monetary loss he has suffered for not being able to work as an engineer in Alberta.

[244] APEGGA is a gatekeeper of engineers and is responsible for licensure in Alberta. The statutory mandate granted by the legislature to APEGGA to govern professional engineers in Alberta places an important obligation upon APEGGA to ensure that its processes are non-discriminatory. APEGGA's regulatory processes have the potential of having a significant impact upon the career paths and the lives of foreign engineers and their families who decide to immigrate to Canada, as we have witnessed in Mr. Mihaly's case.

[245] The Tribunal has the authority to make an award for general damages: *Walsh v. Mobil Oil Canada.*[27]

[246] The Act is remedial and any damages are intended to be compensatory and not punitive. I am especially cognizant of the Act's remedial focus in the context of regulatory bodies like APEGGA performing its mandate and where no *mala fide* intention can be attributed. Mr. Mihaly, however, has suffered injury to his dignity. The process that was used did not appropriately individually assess Mr. Mihaly's qualifications. APEGGA asked him to write numerous examinations and obtain Canadian experience. While he was attempting to get his license with APEGGA he struggled financially and settled for low paying minimum wage jobs as a cleaner and resident manager. The only work he found as an engineer was deemed to be of a technical nature by APEGGA when his application was reviewed in 2007. In his evidence he described the impact all of these challenges have had on him professionally and the hard times his wife and son have had to endure alongside him.

[247] During all of this time, no one at APEGGA reviewed his application in direct contact with the universities from which Mr. Mihaly had a degree. No one at APEGGA offered any meaningful assistance to Mr. Mihaly in order that he would be better able to meet their qualifications, or correct any perceived deficiency. There was no meaningful exploration of options by APEGGA that may have both assisted Mr. Mihaly and met APEGGA's standards for competency and safety. I have taken into consideration all of these factors and award general damages in the sum of $10,000.00 to Mr. Mihaly.

[248] I decline to award lost wages to Mr. Mihaly. While I have found a breach of the Act and criticized the process used by APEGGA to evaluate Mr. Mihaly's qualifications, 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.

[249] However, if Mr. Mihaly wishes to pursue his engineering career and in an attempt to place Mr. Mihaly in the position he would have been in but for the discrimination, and mindful that

[27] *Walsh v. Mobil Oil Canada, 2013 ABCA 238.*

there are experienced members on the APEGGA Board who are better placed to undertake individual assessment, I Order APEGGA to:

(a) Review Mr. Mihaly's transcripts and experience in direct consultation with the Slovak University of Technology, the Institute of Chemical Technology and any of his references who may still be available, to better identify Mr. Mihaly's skills and qualifications and to identify core areas of engineering from which Mr. Mihaly could be exempted;

(b) Grant Mr. Mihaly the option to challenge specific examinations in areas where he is not granted an exemption by APEGGA;

(c) 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. Once these options have been evaluated, APEGGA shall apply these individual assessment options to 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 method of assessment, such as some type of graduated or modular approach which would provide Mr. Mihaly assistance and guidance to progress gradually in the engineering profession. Other explorations could include a possible collaboration of APEGGA 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.

(d) 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;

(e) Direct Mr. Mihaly to resources within the profession which will allow him to network with other foreign engineering graduates facing similar challenges; and

(f) Direct Mr. Mihaly to community resources which would assist him to increase his fluency and facility in the use of the English Language.

[250] While this remedy addresses Mr. Mihaly's situation, this may also be an opportunity for APEGGA to develop a comprehensive approach to ensure that foreign engineers, like Mr. Mihaly, have an opportunity to have their skills assessed based on their actual knowledge and experience. As the Tribunal stated in *Bitonti, supra:*[28]

> *...it cannot be in anyone's interest to continue to accept into this country some of the best and brightest individuals from around the world, and to then make it virtually impossible for them to use the skills that they bring with them.*

RETALIATION

[251] Mr. Mihaly's complaint also contained the allegation that APEGGA did not grant him registration in retaliation for him filing a human rights complaint with the Commission. Mr. Mihaly did not pursue this point and provided no evidence during the hearing on retaliation. I dismiss this allegation.

APPENDIX:

1. Overview of APEGA's Registration Process for Assessment of Academic Credentials

2. Glossary

[252] I would like to thank both parties and witnesses for their participation in this matter. I would also like to specifically acknowledge counsel for the respondent for his excellent advocacy, as well as his courtesy and professionalism towards Mr. Mihaly, as a self-represented party.

February 6, 2014

Moosa Jiwaji, MBA, LL.B
Tribunal Chair

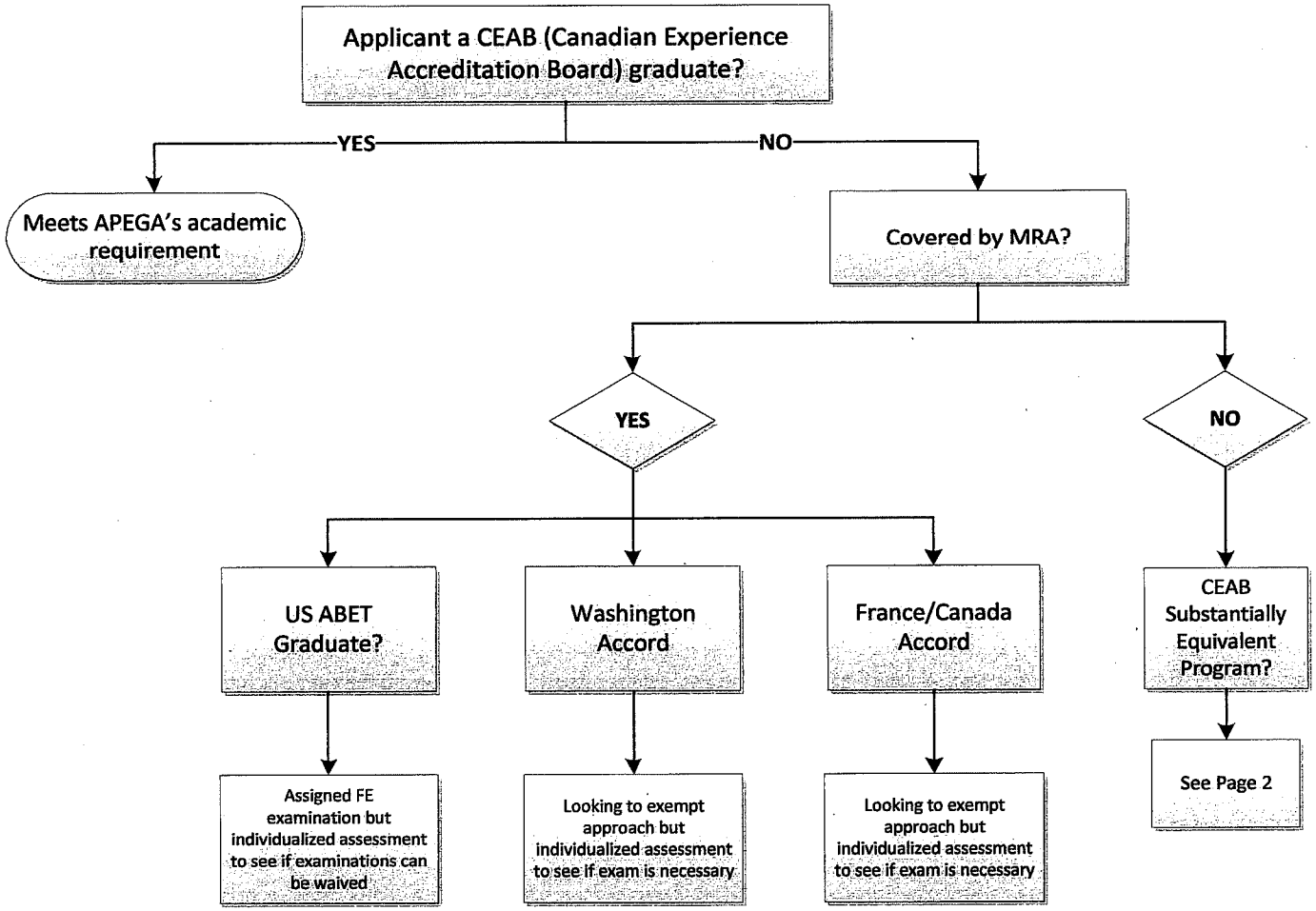
[28] *Bitonti, supra at para. 381.*

Appearances:

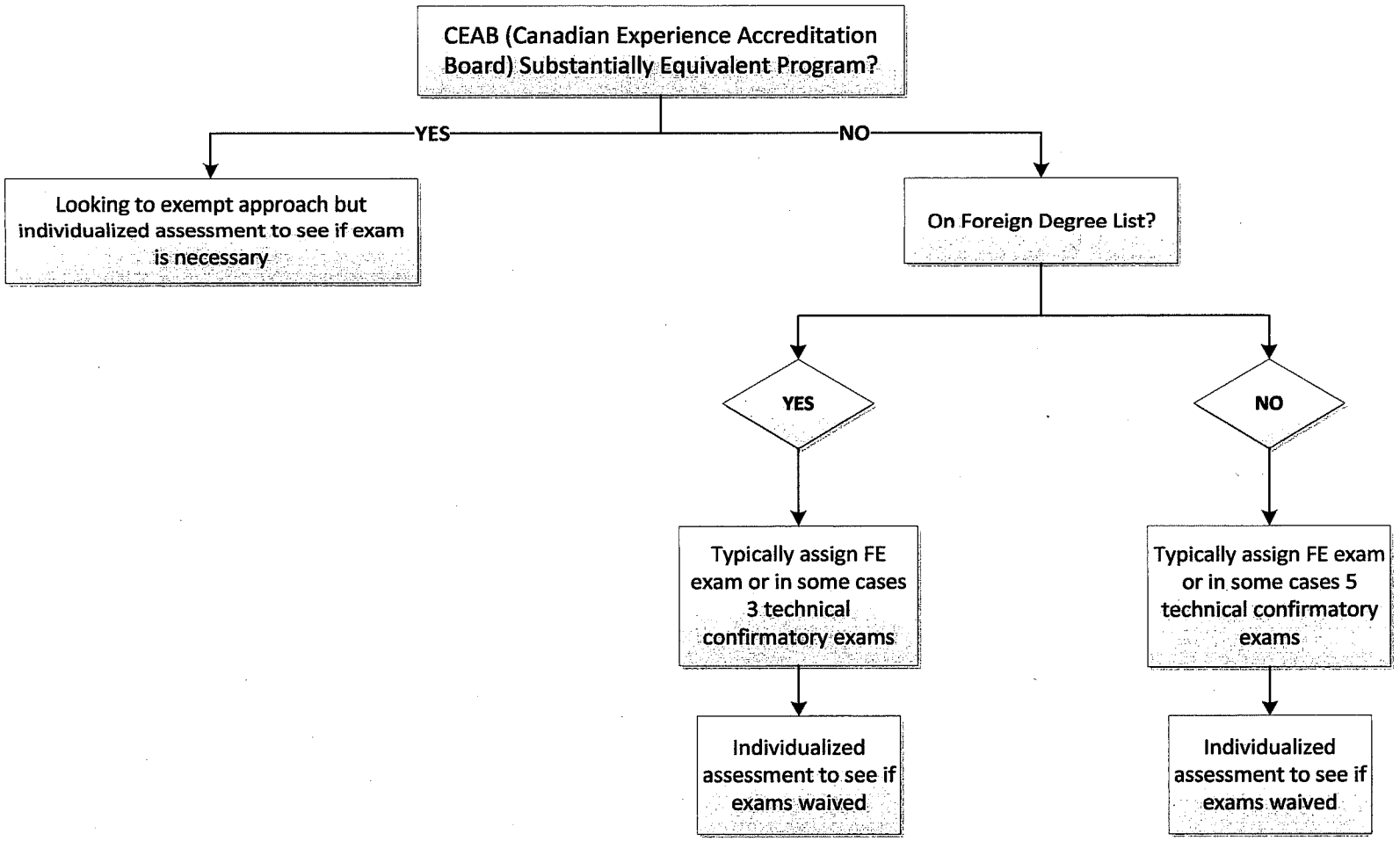
Mr. Ladislav Mihaly, Complainant
on his own behalf

Mr. James T. Casey, QC, Legal Counsel
for the Respondent The Association of Professional Engineers
and Geoscientists of Alberta

Overview of APEGA's Registration Process for Assessment of Academic Credentials – Page 1 of 2



Overview of APEGA's Registration Process for Assessment of Academic Credentials – Page 2 of 2



Appendix 2

GLOSSARY

ABET:	USA Accreditation Board of Engineering and Technology
CEAB:	Canadian Engineering Accreditation Board
CEQB:	Canadian Engineering Qualification Board
FDL/FD List:	Foreign Degree List
FE:	Fundamentals of Engineering Examination
FEQC:	Foreign Engineering Qualifications Committee
IEG:	Internationally Educated Graduate
MRA:	Mutual Recognition Agreement
NCEES:	National Council of Examiners for Engineering and Surveying
NPPE:	National Professional Practice Examination