

Systemic Discrimination By Regulators

by Richard Steinecke
February 2014 - No. 183

Last month's Grey Areas article discussed how courts and human rights tribunals are increasingly reluctant to permit collateral proceedings. Applicants for registration and members are expected to raise human rights issues in the usual regulatory proceedings and not to bring a separate human rights complaint. There are some exceptions, however, such as where the validity of the enabling legislation or regulatory processes adopted by the regulator is in issue. Systemic discrimination complaints may still be available in some circumstances.

This month the National Post reported on one such case. In *Mihaly v. The Association of Professional Engineers, Geologists and Geophysicists of Alberta* (APEGGA), 2014 AHRC 1 the Alberta Human Rights Commission found that APEGGA's registration process for international graduates was discriminatory. The APEGGA is seeking judicial review of that decision. If the decision stands it will have significant implications for the registration of international applicants by almost all regulators.

Mr. Mihaly had two degrees, with at least one of them related to professional engineering, from Czechoslovakia. Because the schools were not from a jurisdiction with recognized accreditation, he was required to pass three examinations to demonstrate that his education was equivalent to that of a Canadian program. He was also required to pass a

professional practice examination (a jurisprudence test) which he failed three times. He was also required to obtain one year of Canadian experience. Mr. Mihaly complained that these requirements discriminated against him based on his "place of origin".

APEGGA challenged the jurisdiction of the tribunal on the basis that the location of one's school of graduation was not the same as one's place of origin and thus the human rights provisions did not apply. The tribunal rejected that argument, holding that the location of the school is a proxy for a person's place of origin.

The tribunal then went on to find that the imposition of additional examinations on international graduates imposed a significant adverse impact inextricably connected to his place of origin. The tribunal concluded: "I do find that certain requirements for licensure made of Mr. Mihaly perpetuated disadvantage thus constituting substantive discrimination".

The tribunal then rejected APEGGA's justification for the examination requirements on the basis that they were reasonably necessary to protect the health and safety of the public by ensuring that Mr. Mihaly was competent. The tribunal did not think that the imposition of the three examinations on most graduates of an unaccredited educational program was sufficiently individualized. The regulator should have either assessed the merits of the individual school or should have assessed Mr. Mihaly individually. The tribunal suggested that this could be done through a structured interview of Mr. Mihaly by the regulator, through a bridging program or through

FOR MORE INFORMATION

This newsletter is published by Steinecke Maciura LeBlanc, a law firm practising in the field of professional regulation. If you are not receiving a copy and would like one, please contact: Richard Steinecke, Steinecke Maciura LeBlanc, 401 Bay Street, Suite 2308, P.O. Box 23, Toronto, ON M5H 2Y4, Telephone: 416-626-6897
Facsimile: 416-593-7867, E-Mail: rsteinecke@sml-law.com

WANT TO REPRINT AN ARTICLE

A number of readers have asked to reprint articles in their own newsletters. Our policy is that readers may reprint an article as long as credit is given to both the newsletter and the firm. Please send us a copy of the issue of the newsletter which contains a reprint from Grey Areas.

Grey Areas

A COMMENTARY ON LEGAL ISSUES AFFECTING PROFESSIONAL REGULATION

a modular assessment process. The tribunal did not discuss the common concerns that exists for these approaches, such as the subjectivity of an interview process or that it is not within the mandate of a professional regulator to establish a bridging program.

Interestingly, the tribunal also found that the professional practice examination (i.e., jurisprudence test) that Mr. Mihaly failed three times was also discriminatory even though all applicants for registration had to pass it. The test was unnecessarily overwhelming for international graduates with little exposure to Canadian laws and practice cultures. Alternative ways of ensuring that applicants learned the local rules needed to be considered. These alternatives included providing more study resources, providing more feedback on failed attempts, administering the test in a modular fashion so the learning could be done in smaller chunks and considering provisional licensing with the learning of local rules gained afterwards while practising.

The tribunal also found that the one year Canadian experience requirement was discriminatory. The tribunal held that expecting applicants to work under supervision failed to recognize the difficulty for new Canadians to find such positions. The tribunal suggested that the goals of the Canadian experience requirement could be achieved through a formal mentoring program or through a course.

While the tribunal did not award Mr. Mihaly monetary damages for lost income, it did impose a strict series of procedural obligations on the regulator including establishing a process for assessing the educational qualifications of international graduates without the routine administration of examinations,

doing its best to locate a mentor for Mr. Mihaly and attempting to find community resources to support Mr. Mihaly including with other professional engineers and to improve his language fluency skills.

Few regulators would meet all of the expectations of the human rights tribunal as described in this case. As noted above, the APEGGA is challenging the tribunal's decision in court.

The *Mihaly* case can be found at: www.canlii.org.