

ENGG 513:
The Role and Responsibilities of the Professional
Engineer in Society

Report 1 – Mihaly vs. APEGA

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Introduction

The following report summarizes the legal proceedings and analyzes key ethical issues regarding the recent Alberta Court cases of Mihaly vs. APEGA. Key stakeholders within the case are described, and the decisions made by the authoritative parties are examined. A personal reflection on the case is also included. This is an interesting case which provides insight into the process of becoming registered as a Professional Engineer (P. Eng.) in Alberta. It illustrates the complex policies that APEGA utilizes in order to ensure that all professional members are qualified, as well as the difficulties experienced by certain international graduates in having their credentials assessed.

Mr. Mihaly is an internationally educated graduate who immigrated to Canada and has experienced difficulties in registering as a P. Eng. with APEGA. He eventually launched a complaint with the Alberta Human Rights Commission, claiming that he was discriminated against based on his place of origin when APEGA denied his registration as a P. Eng. The Commission ruled that APEGA indeed discriminated against Mr. Mihaly, and ordered that APEGA individually assess Mr. Mihaly's credentials to better understand his international skills and experience. The Commission's decision was appealed to the Court of Queen's Bench, where the decision was reversed and the Court ruled that APEGA's standard for confirming technical knowledge of internationally trained graduates was justified. Mr. Mihaly appealed the Court of Queen's Bench decision to the Alberta Court of Appeals, and the Appeals Court decided to reject the appeal. This decision by the Appeals Court appears to have provided closure for this matter, and APEGA's policies for evaluating internationally educated graduates has been validated.

Stakeholders

- *APEGA*

APEGA regulates the practice of engineering and geoscience in Alberta on behalf of the Alberta Government through the Engineering and Geoscience Professions Act (EGPA) [1]. It is APEGA's duty to ensure the competency of practicing professionals and uphold high standards in licensing only highly qualified individuals. APEGA is the recipient body for the Human Rights complaint made by Mr. Mihaly, where the complainant alleged that APEGA had discriminated against him based on his place of origin when he was denied registration as a P. Eng. [2]. APEGA has an established procedure for evaluating the credentials of foreign trained engineers and applied them in the determination of whether to license Mr. Mihaly as a P. Eng. This complaint calls into question the procedures used by APEGA to evaluate internationally educated graduates, and thus the final result of this case study will have an impact on whether APEGA's policies will have to be reevaluated and/or altered.

- *The Court of Queen's Bench*

The Court of Queen's Bench conducts criminal matters, civil proceedings, and the judicial review of government and tribunal action in Alberta as constituted by the Court of Queen's Bench Act [3]. It is the Superior Trial Court for the Province. The Court heard the appeal of the decision made by the Alberta Human Rights Commission, and disagreed with

the Commission's ruling and reversed the decision [4]. Essentially, the Court evaluated whether the Commission had correctly applied the *prima facie* discrimination allegation, and also evaluated whether the Commission's logic was acceptable in assessing that APEGA's licensing requirements were unreasonable.

- *The Alberta Human Rights Commission*

The Alberta Human Rights Commission is established through the Alberta Human Rights Act to carry out functions under the Act [5]. The Commission's mandate is to foster equality and reduce discrimination. Human Rights complaints are heard by the Commission and a decision is then made as to whether the complaint has merit, and if that is the case, a remedy is ordered. The Commission received Mr. Mihaly's Human Rights complaint and agreed that he had succeeded in establishing that the standards employed by APEGA to assess his credentials constituted discrimination that could not be justified [2]. The Commission ruled that a *prima facie* discrimination was established, and that APEGA was not reasonable in their assessment of Mr. Mihaly's credentials. The Commission believed that Mr. Mihaly deserved a more individualized assessment of his credentials based on his Human Rights, and ordered APEGA to conduct this individualized assessment.

- *Mr. Ladislav Mihaly*

Mr. Ladislav Mihaly is an individual who resided in Alberta during the time period pertaining to the legal proceedings of this case study. Mr. Mihaly was born and educated in Czechoslovakia, and this education included a M.Sc. Diploma with a specialization in Technology of Fuels and Thermal Energy, as well as a certificate in Corrosion Engineering [4]. Prior to immigrating to Canada, Mr. Mihaly claimed to have had close to 12 years of international experience as a practicing engineer. Upon immigration to Canada, he applied to register as a P. Eng. through APEGA. APEGA subsequently required that he pass a set of competency exams in order to ensure that their professional standards were met. After subsequent failures by Mr. Mihaly to pass and/or attempt the exams required by APEGA, he launched a complaint with the Alberta Human Rights Commission claiming that APEGA discriminated against him based on his place of origin when they refused his registration as a P. Eng. Mr. Mihaly believed that he had experienced adverse effects due to the alleged discrimination, and sought registration as a P. Eng., as well as compensation for lost wages that would have been earned if he was licensed in the time preceding the legal trials.

- *The Court of Appeal of Alberta*

The Court of Appeal of Alberta is the highest appeal court in the Province [6]. This court hears criminal appeals from the Provincial Court and both criminal and civil appeals from the Queen of Court's Bench [7]. It also hears appeals from administrative and board tribunals. The Court of Appeal reviews case records to determine whether errors of law or fact were made in decisions. The Court of Appeals made the decision on whether to restore the appeal by Mr. Mihaly, which was submitted in response the decision of the Queen of Court's Bench to reverse the Alberta Human Rights Commission's ruling. The Appeal Court determined

that Mr. Mihaly had not met the requirements to restore the appeal and the appeal application was dismissed [8].

- *Other internationally educated graduates*

Other international graduates from institutions who do not hold Mutual Recognition Agreements with Canada are also affected by the outcome of this case. If Mr. Mihaly had succeeded in arguing that APEGA's standards for assessing internationally trained engineers was discriminatory and unreasonable, individuals with similar backgrounds as Mr. Mihaly would be able to argue the same case. Thus, APEGA would have to offer more individualized assessments in determining the qualifications of these individuals.

- *Other self-governing professional bodies in Canada*

Other self-governing professional bodies in Canada are also be affected by the outcome of this case, for example the College of Physicians and Surgeons of Alberta. Similar to APEGA, these groups develop standards and procedures for the registration and licensing of their professional members. If it was found that APEGA was unreasonable in its application of standards to assess the qualification of internationally trained engineers, similar cases of Human Rights complaints would then have greater justification from international professionals in other sectors. These other self-governing bodies would have to potentially reevaluate their own standards for registering internationally educated graduates.

Background

This case study begins with the attempt of an internationally educated graduate, Mr. Ladislav Mihaly, to become registered as a P. Eng. with APEGA. Mr. Mihaly was born in Czechoslovakia and possessed a M.Sc. Diploma with a specialization in Technology of Fuels and Thermal Energy, as well as a Certificate in Corrosion Engineering; these obtained from schools in his place of origin [4]. Mr. Mihaly also claimed to have had close to 12 years of international experience in the practice of engineering. In order to become licensed as a P. Eng. in Alberta, APEGA required Mr. Mihaly to complete and pass the National Professional Practice Exam (NPPE), as well as pass technical exams and pass a course in engineering economics in order to ensure he met the standards to practice engineering in Alberta. After failing to pass the NPPE, as well as failing to attempt any of the assigned technical exams, Mr. Mihaly filed a complaint with the Alberta Human Rights Commission alleging that he was discriminated against by APEGA based on his place of origin when he was denied registration as a P. Eng.

In determining the procedure for Mr. Mihaly to become registered as a P. Eng., APEGA reviewed his educational and professional background. With regards to his education, APEGA determined that the institutions he was educated at were included on the Foreign Degree (FD) List, and this means that they had not been assessed as being substantially equivalent to Canadian engineering programs. They also found that his Master's degree was similar to a Bachelor's level as per their standards and based on their knowledge of the program. This is significant because if it was determined his Master's degree was substantially equivalent to a Master's degree obtained from a Canadian institution, the technical exam requirements could be

waived. In assessing his professional experience, APEGA found that while he had many years of experience, it was not of increasing complexity or responsibility and thus was not satisfactory for their standards. Because of the lack of knowledge about the quality of Mr. Mihaly's education, and because APEGA considered his professional experience as being inadequate for the purpose of waiving examinations, APEGA required that he was to complete three confirmatory exams and pass a course in engineering economics, or pass the Fundamentals of Engineering (FE) Exam. These requirements were to ensure that his educational background met the requisite standards to practice engineering in Alberta. In addition to the technical exams, Mr. Mihaly had to pass the NPPE, which is required of all applicants who wish to practice engineering in Alberta. Passing the NPPE signifies that the applicant is knowledgeable about law, ethics, and professional engineering practice in Canada.

The Human Rights Commission Tribunal reviewed the Human Rights complaint and decided that Mr. Mihaly had succeeded in establishing that the Examination Standard and the Experience Standard used by APEGA to assess his credentials constituted discrimination that could not be justified [2]. The Tribunal cited recent precedent by the Supreme Court of Canada for the requirements to establish a discrimination case in the area of services. Essentially, there are three primary considerations: that Mr. Mihaly possesses a certain characteristic that is protected from discrimination (in this case, place of origin); that he experienced an adverse impact because of this characteristic (in this case, having to write the NPPE and the technical exams); and that the protected characteristic was a factor in the adverse impact. The Commission also had to provide reasonable evidence that, if a *prima facie* discrimination case was indeed established, that the discrimination could not be justified by the Human Rights Act. In order for discrimination to be considered as justified, the employer (or service provider) would have to prove that the rule or requirement that is considered discriminatory is a *bona fide* occupational requirement, and that the employee/practitioner could not be accommodated to the point of undue hardship [9].

The Tribunal concluded that APEGA's policies were based on an assumption that foreign trained engineers are not qualified to the same standard as engineers trained in Canada, and that this assumption was discriminatory [2]. The Tribunal also determined that the standard with which Mr. Mihaly was held to in assessing his credentials was unreasonable. He argued that the technical exams were not *bona fide* requirements because international graduates should have the option to complete more individualized exams to assess their background. He also believed that assessing these individual assessments would not cause undue hardship towards APEGA. Thus, the Tribunal agreed with Mr. Mihaly's Human Rights complaint, because it was believed that the adverse effect that Mr. Mihaly experienced arose because of a discriminatory policy that could not be justified. The Tribunal ordered APEGA to provide a more detailed individual assessment of Mr. Mihaly's credentials.

This decision by the Tribunal was appealed to the Court of Queen's Bench by both the complainant and respondent parties. The Court of Queen's Bench took exception with certain arguments made by the Tribunal, and ruled that the technical exams required by APEGA were reasonable and justifiable to ensure satisfactory technical knowledge to practice engineering in Alberta [4]. In essence, while the Court agreed that the Tribunal reasonably established *prima facie* discrimination stemming from APEGA's requirement to write competency examinations, it

did not agree that the Tribunal's logic in concluding that APEGA's justification for the requirements was unreasonable. The Court also pointed to a lack of evidence that other adverse effects that were experienced by Mr. Mihaly arose because of his place of origin. The Court disagreed with the Tribunal's determination that APEGA made a discriminatory assumption based on the place of education of foreign trained engineers. The Court argued that this was not just an assumption, but based on knowledge and facts about the international programs in question, as well as knowledge about what was required to meet the standards for accrediting for any program, Canadian or otherwise. The Court reversed the decision made by the Tribunal, and Mr. Mihaly's cross-appeal was also dismissed.

Mr. Mihaly then filed a Civil Notice of Appeal with the Alberta Court of Appeal, to appeal The Court of Queen's Bench decision. After failing to file the Appeal Record within the required time, Mr. Mihaly's appeal was struck. Mr. Mihaly then filed an application to restore the appeal, which was subsequently denied by the Court of Appeal because the Court felt that the applicant had not met the criteria for the restoration of the appeal [8]. However, the Appeals Court does analyze the merits of the appeal, and points to the fact that Mr. Mihaly does not identify any error in the decision by the Queen's Court. It is also reiterates that even Canadian Institutions and foreign trained Canadian citizens must demonstrate the equivalency of their programs and training. The decision by the Court of Appeal to deny Mr. Mihaly's appeal appears to have finalized this case study, as this is the highest appeal court in Alberta.

The Court of Queen's Bench Decision

The Court of Queen's Bench considered the arguments made by the Alberta Human Rights Commission Tribunal and decided to reverse the Tribunal's decision. The background facts in the case were not in dispute, however the Court had to determine whether the Tribunal's application of law and facts were correct and reasonable in making the decision. While the Court agreed that a *prima facie* discrimination case was established with regards to having to complete the exams, it did not agree that the discrimination was not justified under the Human Rights Act, and it did not agree that the adverse effects that were experienced arose because of his place of origin [4].

Because of the demonstrated elaborate process that APEGA conducts in order to ensure the accreditation of engineering programs is up to par with their standards for practicing engineering, the Court did not agree with the Tribunal's assertion that APEGA made discriminatory assumptions about the credentials of foreign trained engineers. The Court argued that this was not just an assumption, but it was a decision based on analysis of what is known to be required to meet their standards as well as what is known about the foreign programs. The Court also acknowledged the significant time and resources that are required to thoroughly assess the quality of an engineering program, and that requiring APEGA to perform these assessments on a large number of international programs would be unreasonable and cause undue hardship for APEGA. The Court also disagreed that performing individual assessments of approximately 375 internationally educated graduates per year would not cause undue hardship on APEGA; rather it was argued that this requirement of APEGA would be costly and inefficient. Not only that, but this requirement would fundamentally alter the procedures in which APEGA uses to ensure standards of practice are met. The standardized tests that are

employed by APEGA are required to establish entry-level engineering competence, however the Tribunal argued that, by requiring international graduates to pass these exams, that they were imposing unnecessary requirements on these individuals because there are other methods to assess their credentials. The assertion by the Tribunal that the tests were not necessary was strongly refuted by the Court. The Court argued that possession of entry-level engineering knowledge that is required of Canadian engineering graduates is necessary for safe practice as an engineer, and that by taking the competency exams, internationally trained engineers would demonstrate their education is at par with Canadian graduates. The Court iterates precedent where standardized tests are used in professional regulatory environments to provide an objective assessment of the credentials required of the profession, and that this is a reasonable requirement.

The Court also ruled that there was insufficient evidence to conclude that the adverse effects experienced by Mr. Mihaly arose because of discrimination due to his place of origin. It was pointed out that all applicants, no matter their educational background, were required to pass the NPPE for registration with APEGA. There was also no evidence that Mr. Mihaly was at a disadvantage in passing this exam because of his international education. As well, it is required of any engineering program, Canadian or otherwise, to prove that the program is substantially equivalent to the standards set by APEGA. Also, Canadian citizens who are educated internationally would be held to the same standard as Mr. Mihaly to prove their credentials. The Tribunal argued that Mr. Mihaly experienced hardship in becoming employed in Canada because of his place of origin. However, the facts of the case state that Mr. Mihaly himself claimed he was having trouble becoming employed because firms are reluctant to hire experienced engineers in junior positions. His trouble in becoming employed was therefore due to his years of experience. Thus, his place of origin had no bearing in the assertion that he experienced hardship in obtaining the Canadian engineering experience required by APEGA, and therefore he was not discriminated against in this manner.

Reflection and Opinion

The analysis and summarization of key points pertaining to this case study has provided essential insight into Canadian legislature and APEGA's role in regulating the professional practice of engineering in Alberta. It illustrates the sensitivity of Human Rights and how it is difficult and may be considered unfair by some individuals in how professional bodies assess credentials and regulate the licensing of their profession. However, with all facts considered including evidence provided by each party, it is clear that APEGA acted within its rights to reasonably ensure that their professional standards were upheld.

I do not agree with the decision made by the Alberta Human Rights Commission Tribunal. As summarized by the Court of Queen's Bench, the reasoning behind the Tribunal's conclusion was "rife with logical errors"; included "findings of fact unsupported by evidence"; and it "failures to take into account relevant considerations" [4]. The Court provides strong arguments against the Commission's logic and it is clear that the Tribunal did not correctly apply the law with reasonable arguments in order to make his decision.

I do agree with the Court of Queen's Bench decision to reverse the Tribunal's decision. Because of the severe lack of regard by the Tribunal to formulate reasonable arguments to

determine his decision, and because of the strong arguments made by the Court to oppose the Tribunal's logic, it was completely justified to reverse the decision without remitting the matter back to the Tribunal. The decision made by the Court was important because it had significant ramifications for the future of APEGA's policies, as well as policies of other self-regulating professions in Canada.

I also do agree with the Alberta Court of Appeal's decision. Mr. Mihaly failed to submit the required components for the case to be appealed, and so he had to file an application to restore the appeal. There are a number of factors that are considered when restoring an appeal, and Mr. Mihaly failed to meet any of the factors required by him, and there was indeed prejudice (in the sense of law) against the respondent party (APEGA) in having the appeal be restored. This leads to the conclusion that the Appeals Court was reasonable in the decision to dismiss the appeal. The Court of Appeal also briefly considers the merit of the appeal, and points to the fact that Mr. Mihaly does not identify any error with the Court of Queen's Bench decision [8]. Mr. Mihaly did not formulate any arguments regarding whether the Court of Queen's Bench made any errors in their decision, and it is not the Court of Appeal's duty to provide these arguments for him.

I think that APEGA provides reasonable services, within its operational capacity, to assess the credentials of internationally educated graduates. As argued by the Queen of Court's Bench, requiring that APEGA provide individual assessments for around 375 applicants with similar backgrounds to Mr. Mihaly would be costly and inefficient, and thus cause undue hardship towards APEGA. This requirement would also fundamentally alter the standards for which APEGA assesses the credentials of applicants, which would cause APEGA to act outside its regulatory role. I strongly agree with the point made by the Queen's Bench, that "regulatory bodies should not be expected to change their mandate in a fundamental way" [4]. I believe the best option to avoid similar situations as the one presented in this case study would be for greater collaboration of international countries and/or intuitions with the Canadian Engineering Accreditation Board (CEAB) to form Mutual Recognition Agreements. APEGA does not have reasonable capacity to individually assess the large number of foreign engineering programs that exist, which is why it relies on the work of the CEAB and other national and international organizations to provide the framework to assess engineering credentials. There would be fewer applicants with situations similar to Mr. Mihaly's if there were a greater number of Mutual Recognition Agreements in place.

References

- [1] G. C. Andrews, *Canadian Professional Engineering and Geoscience: Practice and Ethics* (4th Edition), Nelson Education Ltd., 2009.
- [2] *Mihaly v. The Association of Professional Engineers, Geologists and Geophysicists of Alberta*, 2014 AHRC 1, 2014.
- [3] M. Moreau, "About Court of Queen's Bench," [Online]. Available: <https://albertacourts.ca/qb/about/welcome>. [Accessed 18 February 2018].
- [4] *Association of Professional Engineers and Geoscientists of Alberta v Mihaly*, 2016 ABQB 61, 2016.
- [5] Government of Alberta, "About the Commission," 24 October 2012. [Online]. Available: <https://www.albertahumanrights.ab.ca/about/Pages/about.aspx>. [Accessed 18 February 2018].
- [6] The Government of Alberta, "Court of Appeal of Alberta," [Online]. Available: https://www.justice.alberta.ca/programs_services/courts/Pages/appeal_courts.aspx. [Accessed 18 February 2018].
- [7] The Government of Alberta, "Role and Operation of the Court of Appeal of Alberta," [Online]. Available: <https://albertacourts.ca/ca/about/role-and-operation>. [Accessed 18 February 2018].
- [8] *Mihaly v Association of Professional Engineers and Geoscientists of Alberta*, 2017 ABCA 15, 2017.
- [9] "Alberta Human Rights Act, RSA 2000, c A-25.5," [Online]. Available: <https://www.canlii.org/en/ab/laws/stat/rsa-2000-c-a-25.5/latest/rsa-2000-c-a-25.5.html>. [Accessed 19 February 2018].