

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

Assignment 1 – Mihaly Case Study

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Introduction

The purpose of this assignment is for the students registered in ENGG 513 at the University of Calgary to gain a greater understanding of the requirements to become a professional engineer through the Association of Professional Engineers and Geoscientists of Alberta's (APEGA) process as the enacting regulatory body over the profession in Alberta. As per APEGA's statutory authority it is their responsibility to ensure the competency of those that practice engineering in Alberta to guarantee the public's safety when engineers practice. [1]

The case studied is the appeal case of the Association of Professional Engineers and Geoscientists of Alberta v Mihaly, 2016 ABQB 61. [2] This is an appeal of the decision made by the Alberta Human Rights Tribunal made on February 6, 2014 involving the Association of Professional Engineers and Geoscientists of Alberta as the applicant, and Mr. Ladislav Mihaly and the Alberta Human Rights Commission as the respondent, as well as the cross-appeal made by Mr. Mihaly against APEGA. In its original decision, the Tribunal had concluded that APEGA had discriminated against Mr. Mihaly based on his place of origin. [1]

The following report discusses the stakeholders with a vested interest in the results concluding from the decision made by the Tribunal in the initial 2014 case, as well as the appeal in 2016. The background information is then presented in a manner of introducing the timeline that contributed to this case to be brought forth to the Alberta Human Rights Commission. Following that are the concluding decisions of the Court of Queen's Bench, as well as the Court of Appeal's decision. A thorough overview of the reasons for judgement by the Honourable Madam Justice J.M. Ross for the Court of Queen's Bench decision. Then, concluding with a final reflection and opinion of the implications of this case and its relevance to the requirements to register with APEGA as a Professional Engineer in Alberta.

Stakeholders

The Association of Professional Engineers and Geoscientists of Alberta (APEGA) was created in 1920 with the purpose of regulating the practices of engineering and geoscience in Alberta. APEGA's main function is to provide licenses or professional designation to those who would like to practice engineering or geoscience in Alberta, and applicants must meet APEGA's standards regarding education, experience, ethics, and general competency in order to be professionally licensed [3]. APEGA was found to be guilty of discrimination against Mr. Mihaly on grounds of his place of origin by the Human Rights Tribunal of Alberta in 2014, and they were seeking an appeal of this decision [2]. APEGA's stakes in this case is to uphold its values, standards, and processes in order to ensure that all licensed engineers are qualified to practice in Alberta.

The Court of Queen's Bench is Alberta's superior court of criminal jurisdiction, and generally only tries serious criminal offences. However, the Court of Queen's Bench will also hear civil proceedings and appeals from the Provincial Court of Alberta, and will also perform judicial review of government actions. Another function of the Court of Queen's Bench, and perhaps

the most relevant to this case, is the hearing of statutory appeals from decisions of provincial administrative tribunals [4]. The Court of Queen's Bench of Alberta was the overseeing body in the appeal of the Human Rights Tribunal's decision.

The Alberta Human Rights Commission (AHRC) is an independent commission created by the Government of Alberta in order to perform functions under the Alberta Human Rights Act (AHRA). Its goal is to promote equality and reduce discrimination through the implementation of public education and community initiatives, resolving discrimination complaints, and the use of human rights tribunal and court hearings [5]. The Tribunal was the overseeing body in the original case against APEGA, and they found APEGA guilty of discrimination against Mr. Mihaly on grounds of his place of origin in 2014, and ordered APEGA to reconsider Mihaly's application [2]. AHRC's stake in this case is to rectify any claims of discrimination and human rights violations to ensure all persons are experiencing equality.

Mr. Ladislav Mihaly is an engineer who was educated in the former Czechoslovakia, obtaining a M.Sc. Diploma from the Slovak Technical University in Bratislava in 1975 for a specialization in Technology of Fuels and Thermal Energy, and a Certificate in Corrosion Engineering from the Institute of Chemical Technology in Prague in 1981. Mihaly applied to APEGA to register as a Professional Engineer after immigrating to Canada in May 1999, but failed to receive his license due to repeatedly failing the National Professional Practice Exam (NPPE) and failing to take the assigned confirmatory, Fundamentals of Engineering (FE), and Engineering Economics exams. In this case, Mihaly claimed that APEGA discriminated against him in his application to register as a Professional Engineer on grounds of his place of origin, and his goal was to be awarded damages for loss of dignity and income, as well as registration with APEGA [2].

The engineering industry and industries that have some involvement in engineering would be stakeholders in this case, as it would be important to companies that they hire individuals who are qualified for the job. It could be considered a form of "false advertising" for individuals to include the P.Eng title in their accomplishments and be hired for it, but turn out not to have the skills or knowledge required for the advertised position.

Licensed members of APEGA would be stakeholders in this case due to the fact that they have already gone through the necessary process for obtaining licensure for practice in Alberta, making it unjust to allow an individual to be licensed without going through the same process. It could also reflect poorly on licensed professionals if an unqualified individual is allowed to be licensed, because if knowledge of this becomes common, it would cast doubt on the qualifications of already-licensed members.

The general public would also be a stakeholder, as it could become an issue of public safety and trust if an unqualified individual were allowed to practice as a licensed professional. Mistakes made by unqualified individuals due to lack of knowledge and skill would have an adverse impact on the public's environment, thus affecting living conditions and personal health and safety.

Additionally, since this case addresses the accreditation of foreign engineering programs, then academic institutions would also be a stakeholder. If graduates from foreign programs are allowed to be licensed in other countries without acquiring the prerequisite skills, knowledge, and experience, then institutions would have less incentive to develop robust, comprehensive programs for accreditation.

Background

History

The background that contributed to the *Mihaly v APEGA* case to be brought forth to the Alberta Human Rights Commission is discussed in this section. Included are the concluding decisions from the Tribunal appointed by the Chief of the Commission and Tribunals, the Court of Queen's Bench, as well as the Court of Appeal's decision.

Mr. Ladislav Mihaly, the applicant, has had the objective of becoming a Professional Engineer registered with the overlooking regulatory body of the Association of Professional Engineers and Geoscientists of Alberta, the respondent. Mr. Mihaly is from Czechoslovakia and attained a M.Sc. Diploma specializing in Technology of Fuels and Thermal Energy in Bratislava, in 1975 and another certificate in Corrosion Engineering from the Institute of Chemical Technology in Prague in 1981.

In May 1999, after Mr. Mihaly immigrated to Canada from Czechoslovakia he applied to APEGA to register as a Professional Engineer. APEGA acknowledged this application and requested his transcripts, as well as advised him that it was necessary that he complete the National Professional Practice Exam (NPPE). [2]

Once received, the APEGA Board of Examiners informed him of the following:

1. Mr. Mihaly needed to pass three confirmatory exams and take an Engineering Economics course or pass an equivalent exam in the subject.
2. Mr. Mihaly had failed his first attempt at the NPPE exam and needed to reattempt it.

It was defined in a letter APEGA sent him that he had until May 2001 to complete these tasks in order to be reconsidered. By this date, the respondent had not completed these tasks and as such APEGA closed Mr. Mihaly's application. In May 2002, Mr. Mihaly asked to reactivate his application, which APEGA did and again advised him that he was required to complete the above tasks.

In total this process happened three times all with the same outcome, Mr. Mihaly would write the NPPE, fail the exam, as well as not complete the confirmatory exams and the engineering economics exam equivalent. In addition, on the third attempt the board of examinations determined that he was also missing a year of acceptable engineering experience in Canada. [2]

In August 2008, Mr. Mihaly submitted a complaint with the Alberta Human Rights Commission against APEGA stating that he was being discriminated against according to his place of origin by denying him registration as a professional engineer with the regulatory body.

Decisions

The Alberta Human Rights Commission (AHRC)

When there is a complaint brought to the AHRC, these cases are addressed through Tribunal Dispute Resolution. The Tribunal is appointed by the Chief of the Commission and Tribunals. When the Tribunal finds merit in a case they will order a remedy addressing the concerns that may go against the Alberta Human Rights Act (AHRA) in order to stop the respondent from performing such actions. [6]

In the 2014 case, the Tribunal found that Mr. Mihaly made a good case that the standard examinations used by APEGA constituted as discrimination by not considering more individualized assessments. The Tribunal has the power to order the party that went against the AHRA to implement new policies. With this being said the Tribunal ordered APEGA to reconsider Mr. Mihaly's application, as well as required APEGA to appoint a committee to provide individual assessment options to the respondent to correct anything lacking in his education. The Tribunal also ordered APEGA that they should guide and support Mr. Mihaly by providing different options of assessments to help him integrate into the engineering profession in Alberta. Mr. Mihaly had also requested damages for loss in wages over this dispute, but as it is challenging to determine the causal relationship between his pursuits of registering as a Professional Engineer with APEGA and his employment this was dismissed. [2]

The Court Queen's Bench

The decision made by the Tribunal in February 2014, is under appeal to reverse the Tribunal's decision by APEGA, the applicant, and cross-appeal requesting damages by Mr. Mihaly, the respondent. The following section goes into detail to for the judgement of the Honourable Madam Justice J.M. Ross to dispute the reasons behind the Tribunal's decision.

The appellant, APEGA, brought up the issues surrounding procedural fairness, jurisdiction, *prima facie* discrimination, and justification of the Tribunal's decision. The judge determined that the Tribunal did not violate the rules of procedural fairness. With regards to jurisdiction, the appellant did not justify that the Tribunal had acted outside of its jurisdiction. However, when it came to the *prima facie* discrimination, the judge agreed that the Tribunal's findings that APEGA's policies were based on discriminatory assumptions was not supported by evidence. The Tribunal unreasonably applied the Moore test from *Moore v British Columbia (Education)* by not considering the NPPE and Canadian experience requirements. [2] As for the justification of the Tribunal deciding that APEGA should have accommodated Mr. Mihaly, this was considered illogical. It is not unreasonable for the regulatory body to have the expectation that its registered members have entry level engineering competence in order to practice engineering in Alberta safely. [2]

As such the disposition of the appeal was that the Tribunal's decision be reversed, and as for the cross-appeal, it is dismissed. Mr. Mihaly cross-appeal was dependent on the presence of *prima facie* discrimination, but it was not justified according to s 11 of the AHRA. [2]

The Alberta Court of Appeal

The Alberta Court of Appeal was not involved in these legal proceedings as provincial court decisions are appealed in the Court Queen's Bench. Should there be an appeal of the APEGA v. Mihaly, 2016 case, then that appeal would be brought to the Alberta Court of Appeal.

The Court of Queen's Bench Decision

APEGA filed for an appeal in November 2014, to which Mr. Mihaly filed a response statement the same day. The hearing was set for December 2014, but did not proceed due to the Court's wish to receive submissions on behalf of Mr. Mihaly. The appeal hearing proceeded in July 2015 [2].

Supporting Arguments

Procedural Fairness

APEGA argued that the Tribunal had breached the rules of procedural fairness by advancing grounds without informing APEGA. The Tribunal had argued that the examinations assigned to Mr. Mihaly were not for the purpose of correcting any perceived academic deficiencies, as stated in section 8 of the Engineering and Geoscience Professions General Regulation (EGPR). APEGA's counter-argument was that the Tribunal had misinterpreted the statement in the EGPR, ignoring the disjunctive "or" that specifies P.Eng applicants may be assigned confirmatory exams *or* exams to correct academic deficiencies. APEGA's argument in terms of procedural fairness was that the Tribunal had breached the duty of fairness by basing their decision on grounds that were not advanced to APEGA, and to which APEGA had no opportunity to address. Thus, the court determined APEGA had not established a breach of procedural fairness [2].

Jurisdiction

APEGA's submitted the Tribunal had no jurisdiction over Mr. Mihaly's complaint, as the AHRA does not protect against discrimination based on an individual's place of education, only place of birth. However, the court found that there was a clear linkage between Mr. Mihaly's place of birth and his place of education under the Moore legal test. The court determined APEGA had not established that the Tribunal lacked jurisdiction over Mr. Mihaly's complaint [2].

Prima facie Discrimination

The Tribunal's submission was that APEGA's requirements for foreign graduates constituted *prima facie* discrimination, and that this adversely impacted Mr. Mihaly. APEGA submitted Mihaly was unable to establish adverse impact because he never wrote the assigned exams, so it was unknown whether he would pass [2].

Mr. Mihaly claimed the requirement to possess one year Canadian experience under a licensed P.Eng was discriminatory. However, there was no evidence to support this, and the Tribunal found there were too many uncertainties to find a causal connection between this and his loss of wages [2].

The Tribunal found that APEGA's requirements perpetuated disadvantage against foreign graduates. APEGA asserted they do not assume qualifications until the institution satisfies the CEAB. There was also no evidence that taking the NPPE had an adverse impact on Mr. Mihaly, despite the fact he failed the exam three times. The court found that the Tribunal's findings were unreasonable, and that *prima facie* discrimination was not applicable [2].

Justification

The Tribunal found that APEGA's requirement for Mr. Mihaly to write the confirmatory or FE exams was *prima facie* discrimination, and thus needed to be justified. The Tribunal argued the requirements were not justifiable, asserting Mr. Mihaly should only have needed exams to correct academic deficiencies after an individualized assessment of his credentials, and should not have been required to write a standardized exam. APEGA countered that the Tribunal had misinterpreted the EGPR, and that the Tribunal had no familiarity with the EGPR, seeking no submissions regarding interpretation. Thus, APEGA asserted the Tribunal's interpretation was unreasonable [2].

The Tribunal had also critiqued APEGA's process of creating their foreign degree (FD) list. This was found to be beside the point, as Mr. Mihaly's program was on the FD list, allowing him to take three confirmatory exams instead of five [2].

The Tribunal also argued that APEGA should negotiate with more academic institutions. However, there was no evidence that APEGA would have the resources or ability to do this, due to the large number of existing engineering programs and the complexity of the accreditation process, relying on the Canadian Engineering Accreditation Board (CEAB) to determine qualifications. Thus, it was found that APEGA's policy to assign confirmatory exams was consistent with the EGPR, used only to determine competency where competence was not established by the program [2].

The Tribunal found issue with APEGA's requirement for standardized testing, finding that this would disproportionately impact foreign graduates. However, the evidence suggested otherwise, as the FE exam had a passing rate of 85%. It was also found that foreign graduates should have little issue passing an exam that tests the foundations of engineering knowledge. The court also found issue with Mr. Mihaly never attempting the assigned exams. The court found that APEGA successfully justified their policies under section 11 of the AHRA [2].

Disposition of the Appeal

APEGA's goal was to reverse the decision made by the Human Rights Tribunal. In section 37(4) of the AHRA, it is stated that the Court of Queen's Bench has the power to either confirm,

reverse, or vary the tribunal's order, or to remit the case back to the tribunal. The final decision of the Court of Queen's Bench was to reverse the Human Rights Tribunal's decision, with no need to remit the matter back to the Tribunal [2].

Disposition of the Cross-Appeal

Mr. Mihaly's cross-appeal was based on the grounds that the cross-appeal only related to remedy. This depended on an unjustified finding of *prima facie* discrimination under section 11 of the AHRA. Following the disposition of the appeal, Mr. Mihaly's cross-appeal was dismissed. [2]

Reflection and Opinion

Accreditation

To put it simply, APEGA has not been unreasonable with Mr. Ladislav Mihaly by requesting that he complete three confirmatory exams, an Engineering Economics course or equivalent exam, as well as a year of Canadian Professional Experience, as APEGA has the statutory obligation towards ensuring that its members have a certain level of knowledge and skills so that they can practice independently safely. [7]

Since Mr. Mihaly has been educated in a non-accredited program by the CEAB, APEGA is unable to know with certainty the extent of the knowledge that Mr. Mihaly learned during his post-secondary education in Czechoslovakia. As such confirmatory exams were assigned to him to confirm that he has the knowledge taught in accredited programs. This is done so with standardized examinations because all entry level engineers in Canada are expected to have this knowledge base in order to practice safely with the public in mind.

In Canada, the CEAB is in place in order to ensure that the national standards for engineers is met by all engineering programs in Canada. You can only become an engineer through an accredited program. For example, the geomatics engineering department at the University of Calgary had the CEAB visit their program last fall. The purpose of the visitation was to maintain the accreditation of their program as the industry changes so that the material learned over the degree remains relevant and applicable. [8]

As such, the accreditation process is a very thorough and extensive process to determine the knowledge gained by engineering graduates. It is reasonable that APEGA would want to ensure that its members that have the exclusive use of the name engineer can practice engineering in Alberta. [9] The steps in place are to accommodate those that want to practice in Canada from non-accredited programs.

Accommodation

Now, APEGA already has some degree of accommodation for foreign-trained engineers and geoscientists in place through Mutual Recognition Agreements (MRA) and the FD list. The programs included have been recognized to some extent, even if the program does not have accreditation. The Tribunal's proposition that APEGA should negotiate more agreements with

foreign institutions in order to accommodate foreign graduates is unreasonable, APEGA simply does not have the resources to do so. Furthermore, the accreditation process is too long and complex to reasonably go through with more foreign institutions [2].

The Tribunal had also suggested APEGA should forgo standardized exams in favor of individual assessments, and to assign a mentor with a similar background to Mr. Mihaly [2]. APEGA's policy of assigning standardized confirmatory or fundamentals exams is to determine the competency of the applicants due to a lack of information on the foreign programs. These exams are standardized for the purpose of ensuring foreign graduates have the level of knowledge and skill expected of all Canadian graduates of accredited programs [2]. The NPPE is assigned in order to confirm the applicant has an acceptable understanding of professionalism, law, and ethics, which all applicants need to pass [10]. To assess each applicant on an individual basis would not only defeat the purpose of the exams, but also cause undue hardship to APEGA because they do not have the resources for this task. To assign mentors to every foreign graduate who applies to be a professional member with APEGA would also strain the association's resources, not to mention that there may not be a professional engineer available to mentor for every foreign graduate's situation.

When the board reviewed Mr. Mihaly's application for the third time, they also determined that he needed to complete an additional year of acceptable engineering experience in Canada under a supervising Professional Engineer to vouch for their experience working in a Canadian Environment. The purpose of this is to ensure all engineers working in Canada have an idea of the expectations here. Therefore, as previously stated, APEGA should not be expected to provide more accommodation for foreign graduates applying for professional membership than it already does. The processes of negotiating with foreign institutions is too complex, and the standardized exams are put in place for the purpose of confirming applicants' knowledge and skills.

Concluding Remarks

The stakeholders at play for this case involved the applicant, respondent and many others, such as the public and professional engineering members of APEGA. The implications of the original decision made by the Tribunal introduces an undue burden onto the regulatory body. In the Court Queen's Bench appeal, the judge clearly identifies the flaws in the original judgement. The Tribunal did not consider all the facts, such as the standardized examinations that members must pass to confirm all members have demonstrate entry level engineering competence that all applicants to APEGA have to take. Therefore, the decision made by the Honourable Madam Justice J.M Ross to reverse the decision made by the Tribunal appointed by the Chief of the Commission and Tribunals is logical and fair.

In conclusion, the accreditation process that is in place in Canada has the objective of ensuring education institutions cover the right material in order to produce engineers that have the knowledge and skills up to the Canadian standards. The accommodations in place to accept

foreign educated engineers into the profession in Canada are extensive and treat all applicants equally by confirming that all Professional Engineering members of APEGA meet the national engineering standards set by CEAB. Methods may differ from individuals based on the accreditation of their post-secondary education institute's accreditation by the CEAB.

References

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