

Mihaly vs. APEGA Case Study Report

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Introduction

This paper examines the ruling of the Court of Queen's Bench of Alberta in the case involving the Alberta Human Rights Commission (AHRC), Mr. Ladislav Mihaly, and The Association of Professional Engineers and Geoscientists of Alberta (APEGA). Mihaly, after immigrating to Canada, applied to the APEGA for permission to practice in Alberta, but was told that his credentials did not meet Canadian standards but that he could qualify by passing a series of exams. When he failed to pass the examinations, the APEGA denied his registration as a professional engineer (Cotter, 2016). On August 5, 2008 Mihaly filed a complaint with the AHRC, stating that the APEGA had discriminated against him on the grounds of: place of origin (Slovak Republic), had refused to recognize his education to be on par with that of accredited Canadian universities, and had required him to write examinations to validate his academic credentials (Court of Queen's Bench of Alberta, 2016). The AHRC decided that the tests were in fact discriminatory and that APEGA should reconsider Mihaly's application, pay him \$10,000 in damages, and provide him with useful resources to become registered (Cotter, 2016). Both parties appealed this decision the Court of Queen's Bench of Alberta. The court upheld APEGA's appeal and reversed the decision of the AHRC (The Association of Professional Engineers and Geoscientists of Alberta, 2016).

This case study will explore the following items: requirements to become a registered professional engineer, APEGA's regulatory process, and the legal and quasi-legal environment in which APEGA operates.

Stakeholders

Ladislav Mihaly:

Ladislav Mihaly, an immigrant from the former Czechoslovakia, in May, 1999 attempted to register with APEGA as a professional engineer. After earning two Masters degrees from Czechoslovakia, one from Slovak University of Technology, the other from the Institute of Chemical Technology, he practiced as an engineer for 25 years in his country of origin (Human Rights Tribunals of Alberta, 2014). In Czechoslovakia, he had worked in senior and lead engineering positions for several companies such as: Fluor, Mitsubishi Heavy Industry, Japan Gas Company and Raytheon Engineering. His decision to immigrate to Canada was based on his specialization in the Oil and Gas Industry and availability of opportunities in Alberta. On August 5, 2008, after 9 years of failing to complete APEGA's registration requirements, he filed a complaint to the AHRC claiming that he was being denied an opportunity to earn a livelihood in his desired profession (Human Rights Tribunals of Alberta, 2014).

APEGA:

APEGA is a self-regulatory organization that regulates engineering and geoscience practices in Alberta. The Alberta provincial government granted this authority through the Engineering and Geoscience Professions Act (APEGA, 2018). APEGA has developed three items to adhere to the

act: (1) Regulations, (2) By-laws, (3) Code of Ethics. These items are the foundation of the organization. Encompassed within these three items includes standards for granting licenses as well as procedures and rules for international applicants. APEGA is an organization that Canadian citizens trust in to ensure the public's safety and sets a standard to which all engineers should to be held accountable.

The Alberta Human Rights Commission:

The purpose of the AHRC is to protect Albertans from discrimination by ensuring all Albertans are given an equal opportunity to earn a living, find a place to live, and enjoy public services. Independent from the Government of Alberta, the AHRC is given power through the Alberta Human Rights Act (Alberta Human Rights Commission, 2012). The Alberta Human Rights Act (AHRA) has the authority to protect Albertans against discrimination by occupational associations (Alberta Human Rights Commission, 2012). Mihaly first filed a complaint through the AHRC because its mandate is to resolve and settle complaints of discrimination through human rights tribunals.

The Court of Queen's Bench of Alberta:

The Court of Queen's Bench (CQBA), is the Superior Trial Court of Alberta, hearing trials in civil and criminal matters as well as appeals from the Provincial Court (Alberta Courts, 2018). The CQBA's mission is, "to provide an impartial forum for the just and proportional resolution of legal disputes, to preserve the Rule of Law and to protect the rights and dignity of all" (Alberta Courts, 2018). Due to the fact that the CQBA hears statutory appeals regarding decisions of certain administrative tribunals, such as the AHRC, the APEGA versus Mihaly appeal was directed to the CQBA to be resolved.

Dean David Lynch:

Dr. Lynch at the time of the tribunal had been a member of the Canadian Engineering Accreditation Board (CEAB) for 11 years in numerous roles such as chair and vice-chair (Human Rights Tribunals of Alberta, 2014). Lynch's role at CEAB was to assess international engineering programs to determine their equivalence to Canadian engineering education. In 1995, in addition to his involvement at CEAB, Lynch had become Dean of the Faculty of Engineering at the University of Alberta, a position which gave him a statutory position on APEGA's Board of Examiners. Under legislation, this board assesses qualifications for both domestic and international professional engineering applicants (Human Rights Tribunals of Alberta, 2014). In the various hearings Lynch testified as an expert witness on behalf of the respondent.

Dr. Gary Faulkner:

Dr. Gary Faulkner, was the Chair of the Mechanical Engineering Department of the University of Alberta when the tribunal initially convened. In 2009, he took a position at Glenrose Rehabilitation Hospital (Human Rights Tribunals of Alberta, 2014). He had been a member of the APEGA Board of Examiners since 1988, and the Chair of the Board since 1995. In addition,

he had been a Board Member of the Canadian Engineering Qualifications Board (CEQB)). Faulkner was the second expert witness for APEGA, defending the examination and qualifications required, as well as the procedure involved to become a registered APEGA member.

Mr. Mark Tokarik:

Mr. Mark Tokarik earned his Bachelor of Science in Engineering in 1981, and Bachelor of Law in 1989. In 1999, Tokarik joined APEGA and was soon appointed Director of Registration. In September 2012, he was appointed Deputy Registrar for APEGA (Human Rights Tribunals of Alberta, 2014). He was also a member of Engineers Canada's Foreign Qualifications Committee (FEQC). The FEQC is responsible for maintaining the Foreign Degree list. Tokarik was one of the members of APEGA who was in contact with Mihaly, informing him that his academic qualifications did not sufficiently meet APEGA's requirements (Human Rights Tribunals of Alberta, 2014, p. 5).

Background

The Mihaly verses APEGA (formerly known as APEGGA, The Association of Professional Engineers, Geologists and Geophysists of Alberta, until March 2012) case began on August 5, 2008 when Mihaly filed a complaint to the ARHC against APEGA claiming that he was discriminated against when he had been denied registration as a professional engineer.

APEGA first acknowledged Mihaly's application in 1999. At this time, APEGA requested Mihaly's transcripts, visa, and Landed Immigration form; he was also informed he was required to write the National Professional Practice Exam. (NPPE) One year later, in 2000, APEGA informed Mihaly that neither his experience nor academic requirements were sufficient for registration and that in addition to the NPPE, he must pass three confirmatory examinations and pass an Engineering Economics exam by May 2001 (Human Rights Tribunals of Alberta, 2014, p. 4). Between 2000 to 2002 Mihaly registered for the NPPE three times, failed it the first time, did not attend the second, and failed the third attempt. Throughout this time, Mihaly had been in contact with Tokarik, who again informed him that his education and experience did not meet APEGA standards and requirements aforementioned to become a professional engineer. From 2000-2006, Mihaly had to reactivate his account three time because had failed to meet the time deadlines to complete his confirmatory exams and each time his file was withdrawn. After his third application activation in 2006, he did not write the exams and filed a complaint to the AHRC against APEGA (Human Rights Tribunals of Alberta, 2014, p. 6).

The grounds of Mihaly's complaint was accepted by the Tribunal under sections 4 and 9 of the AHRA. Section 4 disallows the discrimination of services. Section 9 states that occupational associations cannot, "(a) exclude any person from membership in it" or, "(c) discriminate against any person or member" based on place of origin (Human Rights Tribunals of Alberta, 2014, p. 8).

Following the acceptance of Mihaly's claim by the Tribunal, APEGA's legislative framework highlighting the registration procedure and requirements to be a professional engineer in Alberta was assessed. APEGA's argument was that the "Tribunal has no jurisdiction to consider Mihaly's complaint because the Act does not protect against discrimination based upon the place of origin of academic qualifications" (Human Rights Tribunals of Alberta, 2014, p. 12). APEGA referred to a similar case taken to the CQBA, where this same argument was upheld.

The next phase in the Tribunal was to evaluate evidence brought forth by the complainant, Mihaly, and the respondent, APEGA. Mihaly was the only witness for the complainant, he represented himself. In his testimony, he highlighted his qualifications, and communications with APEGA throughout his application process. However, in cross-examination, several claims regarding his academic requirements incriminating APEGA were proved illegitimate (Human Rights Tribunals of Alberta, 2014, pp. 14-16). Furthermore, Mihaly provided reasons for not taking the exams and described the impact of not being able to practice as an engineer in Alberta had on his family.

Following the complainant's evidence, three witnesses testified on the respondent's behalf. The first witness, Dean Lynch, explained how the CEAB recognizes the international engineering programs and the standard that is required, as well, the competency exams required if an engineer holds a degree not on the Foreign Degree List. The second witness, Dr. Faulkner, provided insight into APEGA's Board of Examiners role and the qualifications required, as well as the procedure involved to become a registered APEGA member. Faulkner testified that the CEQB upholds a standard to protect the public. In addition, Faulkner discussed the entire assessment of Mihaly's application and explained the reasoning for not granting him registration as a professional engineer. The third witness, Tokarik, a member of APEGA who had been in contact with Mihaly, informing him that his academic qualifications did not meet APEGA's requirements. Tokarik reviewed the facts from Mihaly's application as well as the communication between them. Tokarik went on to state that, "the place of origin of an applicant does not play a role in the registration process" (Human Rights Tribunals of Alberta, 2014, p. 34).

The Tribunal continued the case by assessing APEGA's registration standards. In particular, they examined the accreditation, examination and experience standards. Following, APEGA was allowed to justify their action. In doing so, APEGA summarized their points into the following:

1. Everyone is treated equally and must adhere to the same standards and qualifications
2. The standards are necessary to accomplish its general purpose, public safety
3. The standards are adopted in good faith

Despite APEGA's arguments, the Tribunal ruled that Mihaly was successful in establishing that the Examination and Experience Standards used by APEGA to assess his qualification, without a more individualized assessment constituted discrimination. As a result, Mihaly was awarded a

sum of \$10,000 for general damages. In addition, APEGA was ordered to: complete a review of Mihaly's transcripts and experience, establish a committee of internationally trained professional engineers to assess his qualifications, use its best effort to match Mihaly with a Mentor, and to direct Mihaly to helpful resources (Human Rights Tribunals of Alberta, 2014, pp. 61-63). However, both the complainant and respondent were not satisfied with the outcome of the Tribunal and appealed to The Court of Queen's Bench of Alberta.

The CQBA appeal and cross-appeal, presided over by Honourable Madam Justice J.M. Ross, were carried out in a similar manner as the Tribunal hearing. Initially, Mihaly's professional engineering application and complaint was summarized. Next, APEGA's framework and registration process was examined. The Court then took the standards of review, issues on the appeal, procedural fairness, jurisdiction and justification into account. After considering Mihaly's complaint, APEGA's testimony, and the Tribunal ruling, the CQBA reached a decision. Ross ruled that the decision of the Tribunal should be reversed and there is was no need to resubmit the matter back to the Tribunal; Mihaly's cross-appeal was dismissed (Court of Queen's Bench of Alberta, 2016, p. 26).

After this ruling, Mihaly decided to protest this result and filed an appeal to the Alberta Court of Appeal. The appeal was dropped when he failed to follow through, and when he tried to file a second appeal, it was dismissed by Justice Frans Slatter, who said "Even Canadian educational institutions must demonstrate the equivalency of their programs, and Canadians who receive foreign training must also demonstrate equivalency ("Alberta Court of Appeal won't restore foreign-trained engineer's appeal", 2016).

The Court of Queen's Bench Decision

On January 26, 2016, the Court of Queen's Bench upheld the APEG's appeal and reversed the decision of the Tribunal. According to the Justice of Queen's Bench, Honorable June Ross, the ruling of the Tribunal was riddled with errors and inconsistencies, saying, "the tribunal's reasons leading to (the chairman's) conclusion that APEGA could have accommodated Mihaly and others sharing his characteristics are rife with logical errors, findings of fact that are not supported by evidence and failures to take into account relevant considerations" ("Alberta human rights ruling on Czech-trained engineer's accreditation reversed", 2016). The main issues presented by APEGA were regarding Jurisdiction, Procedural fairness and Prima face discrimination (Queen's Court Bench of Alberta, 2016, p. 9).

Their main complaint about procedural fairness was a rule breach by the Tribunal, which decided on issues that were not raised by the parties involved and did not give the parties opportunity to address the issue. Although the APEGA was not given an opportunity to respond to all of the evidence that was presented, the court concluded that the Appellant it did not break the rules with regards to procedural fairness.

One of the issues regarding jurisdiction were that the tribunal's decision involved the difficulty of the requirements of APEGA registration, which is beyond the case and should not have been taken into consideration. The other jurisdictional issue was that the Tribunal was unjustified in accepting Mihaly's complaint, the APEGA submitting that the Alberta Human Rights Commission does not protect against place of origin or academic qualifications, which is the basis of Mihaly's argument. One of the discrepancies of this case is the distinction between "place of origin" and "place of education." In the report by the Queen's Court Bench, "There was no statistical evidence in this case connecting place of engineering education and place of origin. However, there is no dispute regarding the Tribunal's finding that Mihaly's place of education was "inextricably linked" to his place of origin. Mihaly was born, grew up and was educated in his place of origin. When he immigrated to Canada, he came with his educational background, in the same way that he came with his culture and language (Queen's Court Bench of Alberta, 2016, p. 17). It was determined that Mihaly's place of origin had a negative impact on him, which is the reason that he felt he was being discriminated against. With that being said, Mihaly failed his exams three times, and there was no evidence showing that this was in any way related to his place of origin, which is a key reason the Tribunal's decision was reversed.

With regards to Prima face discrimination, APEGA brought up concerns about the legal test used by the Tribunal, and whether the test was correct and accurately applied in order to determine if Mihaly had experienced Prima Face discrimination. There is also a question about discrimination with regards to the one year of Canadian engineering experience required before an applicant can be considered to join APEGA. To join APEGA it is required that members have at least four years of engineering experience, with one of those years taking place in Canada. This is to ensure that the applicant is able to understand Canadian codes, and get an understanding as to how engineering is practiced in Canada (Queen's Court Bench of Alberta, 2016, p. 18). Mihaly did not meet the requirement of working one year in Canada, and it was determined that his place of origin did not negatively affect his ability to find work. The report states that,

"The scope of prima facie discrimination is important here. The Tribunal found that APEGA did not reasonably accommodate Mihaly, not only in relation to the requirement that he confirmatory examinations or the FE Exam, but also in relation to the requirements to write the NPPE and to complete one year of Canadian experience before being certified. Justification under s 11 of the AI-IRA is required only in relation to conduct which has been found to constitute prima facie discrimination. Thus, the Tribunal's findings that the NPPE and Canadian experience requirements were unjustified were clearly outside his role under s 11, and unreasonable," (Queen's Court Bench of Alberta, 2016, p. 20).

These claims all contributed to the final ruling by the Queen's Court Bench of Alberta overturning the ruling of the Tribunal in favour of APEGA. It is clear that the initial ruling was full of errors, and information that was unclear. The fact remains that APEGA did not assign Mihaly entrance exams due to a discriminatory perception that he was unqualified due to place

of origin. The professional association assigns these exams to assess the quality of the engineering program (Queen's Court Bench of Alberta, 2016, p. 21). This is a standardized process, and not one that reflects Mihaly's culture or place of birth. Mihaly failed the tests that took and it is impossible to know how he would have performed on the other tests for he neglected to take them at all. There is no evidence suggesting that internationally educated engineers have difficulty finding work in Canada; a large number of APEGA applicants are internationally educated, and go through the procedure of gaining work experience, writing the exams and becoming members. The fact that Mihaly was unable to gain membership into APEGA is a reflection of himself, and not due to discrimination from APEGA.

Reflection and Opinion

In our opinion, the Alberta Human Rights Commission made a mistake in deciding that APEGA was discriminating against Mihaly. The reasoning behind the Tribunal's decision was shrouded in error and based on poor information. We believe that the decision made by the Court of Queen's Bench and the Alberta Court of Appeal to revoke the verdict of the Tribunal was the right choice. This is a good example of the justice system producing a fair and ethical outcome. There are many factors that lead to our support of APEGA in this conflict. The foremost reason is the fact that Mihaly was clearly unqualified to practice as an engineer in Alberta, due to his performance on the written exams and lack of requisite education as determined by APEGA. Had he been an adequate candidate to receive his certification to practice as an engineer, he would have been able to pass his confirmatory examinations and there would never have been a conflict in the first place. This does not mean that one failed exam is enough to discredit Mihaly entirely. Mistakes can be made, and it is not fair or accurate to judge the intelligence of an individual on a single test. With that being said, the repeat failures, as well as examinations that Mihaly neglected to attend, reflect a lack of understanding of the required content, as well as a lack of character. Mihaly missed three different deadlines during his application process, causing his application to be denied each time, and frankly, it is preposterous for him to claim that he was being discriminated against when he inexcusably missed deadlines. Failing a test is a mistake that is correctible, as one may need to do more work in preparation in order to perform better the next time. Repeatedly not showing up for examinations is a direct reflection of character, and an overall lack of commitment to his profession. Mihaly's negligence towards his application seems to come from a sense of entitlement, a dangerous quality for a professional engineer to demonstrate.

APEGA is a self-governing association, and part of being self-governing is the ability to regulate who is qualified to join. If the initial ruling by the Alberta Human Rights Commission had held up, this would negatively affect the ability for professions to govern themselves, according to Mark Flint, the CEO of APEGA at the time of the conflict ("Alberta human rights ruling on Czech-trained engineer's accreditation reversed", 2016). This does not just refer to engineering, but also to other self-governing professions such as Medicine and Law. If a complaint to the

Human Rights Commission were more powerful than the policy of the organization, this would begin to set a precedent that others would soon follow, which could impact the selection process for these self-governing professions.

Holding an APEGA Professional Engineering licence is a momentous responsibility, one that must be taken very seriously. Society and environment rely on the competency of professional engineers for their safety and protection; ensuring that licenses are only granted to qualified candidates is of the utmost importance. A very applicable analogy can be made by mirroring professional engineering with medicine. If an individual was trying to obtain employment in Canada as a neurosurgeon yet was unable to pass the required examinations, the public would feel very unsafe relying on this person to practice medicine. This situation perfectly emulates the conflict in question. Mihaly very well could be qualified as an Engineer in Czechoslovakia; however, he did not meet the requirements to be certified in Canada, and therefore should not be granted his license until he can meet the qualifications.

Anybody looking to be certified as a professional engineer in Alberta should need to meet the requirements set out by APEGA, regardless of where they were born or trained. Foreign engineers should be held the same standard as everyone else. With that being said, APEGA should make an effort to accommodate internationally trained engineers and geoscientists in other ways. They should be provided with ample opportunity to excel in the entrance exams, including the ability access to the testable content, as well as examples of the questions they will be expected to answer. It is beneficial to the province of Alberta, as well as APEGA as an organization, to have the best candidates in the province certified as professional engineers and geoscientists. It would be a waste of talent to have capable persons in the province working in positions that they are over qualified for. As far as a language or culture barrier is concerned, we believe that this is something that the individuals should be responsible for themselves. However, providing individuals with resources that could aid in their learning would help put them in a position that they could contribute to the advancement of Alberta and APEGA. An example of this could be helping to organize study groups, where individuals could work together to help master the skills that would make them successful engineers and geoscientists in Alberta. APEGA should not accommodate foreign trained engineers by weakening the qualifications necessary to become professionals, but instead should provide aid in helping them attain these qualifications themselves. This will benefit everyone, and make APEGA a stronger association.

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