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

Report 1: Mihaly vs APEGA Case Study

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1. Introduction

This report is a case study based on The Court of Queen's Bench of Alberta judgement that involved Mr. Ladislav Mihaly, APEGA, and the Human Rights Commission. The main purpose of the case study is to gain greater insight into the requirements to become registered as a professional engineer once graduated, the legal and quasi-legal environment in which APEGA operates, and APEGA's regulatory process.

In this report, the main stakeholders will be identified, followed by a summary of the history of the case and the three decisions made by the Alberta Human Rights Commission, The Court of Queen's Bench and the Alberta Court of Appeal. The report will end with a reflection on the decisions made by the three bodies and the opinion of the students writing this report regarding those decisions.

2. Stakeholders

A stakeholder is defined in the Business Dictionary online as: "A person, group or organization that has interest or concern in an organization. Stakeholders can affect or be affected by the organization's actions, objectives and policies." (Stakeholder, 2018) The main stakeholders in this case study are mentioned below.

APEGA: "APEGA regulates the practice of engineering and geoscience in Alberta pursuant to the Engineering and Geoscience Professions Act (EGPA) and the Engineering and Geoscience Professions General Regulations (EGPR)." (Association of Professional Engineers and Geoscientists of Alberta v. Mihaly, 2016) Any individual that wants to practice engineering in Alberta must be approved for "registration pursuant to s 2 of the EGPA." (Association of Professional Engineers and Geoscientists of Alberta v. Mihaly, 2016) The Board of Examiners established under s 30 of the EGPA consider all applications for registration as a professional APEGA member. Engineers in Alberta have "Right to Practice" such that no one can practice the profession of Engineering without being an Engineer registered with APEGA.

The Court of Queen's Bench: The Court of Queen's Bench is the Superior Trial Court for the Province of Alberta. The Court of Queen's Bench deals with civil and criminal matters as well as appeals from decisions of the Provincial Court. (Alberta Courts, 2018)

The Alberta Human Rights Commission: The Alberta Human Rights Commission was established to carry out functions under the Alberta Human Rights Act. The Alberta Human Rights Act is there to protect Albertans from discrimination in some areas based on specified grounds. The Government of Alberta creates independently The Commission. The Solicitor General and the Minister of Justice are responsible for the Commission. Members of the Commissions main purpose is to resolve complaints and settle any adjudication. However, it should be noted that the Commission is not a judicial body but a quasi-judicial body that is formed out of statutes. This makes the commission an administrative body whose decisions are under the supervision of the courts. (Alberta Human Rights Commission, 2018)

Mr. Ladislav Mihaly: Mr. Ladislav Mihaly was born in the former Republic of Czechoslovakia. He attended the Technical University in Bratislava where he obtained a M.Sc. Diploma with a specialization in Technology of Fuels and Thermal Energy in 1975. In 1981 he obtained a Certificate in Corrosion Engineering in Prague from the Institute of Chemical Technology. After immigrating to Canada, Mr. Mihaly applied to APEGA for registration as a Professional Engineer in May of 1999. From there a 9 year back and forth communication continued until the 5th of August 2008 when Mr. Mihaly filed a complaint with the Alberta Human Rights Commission. On the 6th of February 2014 the Tribunal concluded that Mr. Mihaly successfully established that APEGA has constituted discrimination, awards \$10,000 in general damages, and ordered APEGA to reconsider Mr. Mihaly's application. The Tribunal Decision was then "under appeal and cross-appeal by APEGA and Mr. Mihaly respectively." (Association of Professional Engineers and Geoscientists of Alberta v. Mihaly, 2016)

Dr. David Lynch: Dr. David Lynch, held a statutory position on the Board of Examiners, as Dean of the Faculty of Engineering at the University of Alberta. Mr. Lynch was also a member of the Canadian Engineering Accreditation Board. This board assesses engineering programs outside and within Canada. (Association of Professional Engineers and Geoscientists of Alberta v. Mihaly, 2016)

Dr. Gary Faulkner: Dr. Gary Faulkner, witness for APEGA, Chair of the APEGA Board of Examiners. Dr. Faulkner testified in the hearing about the review of Mr. Mihaly's application. (Association of Professional Engineers and Geoscientists of Alberta v. Mihaly, 2016)

Mr. Mark Tokarik: Mr. Mark Tokarik, witness for APEGA, Deputy Registrar for APEGA.

3. Background

Mr. Ladislav Mihaly (Appellant) was born and educated in the Former Czechoslovakia. He obtained one of his master's degree from the Slovak University of Technology in 1975 and the other one was from the Institute of Chemical Technology (ICT) in Prague in 1981. He did not at any time take or participate in formal training or education related to the Profession of Engineering in Canada.

3.1. The Alberta Human Rights Commission

In May 1999, after immigrating to Canada, Mr. Mihaly applied to APEGA (The Alberta Association of Professional Engineers and Geoscientist) (Respondent) for registration as a professional Engineer. APEGA requested Mr. Mihaly to write three exams which are below

1. The National Professional Practice Exam (NPPE) which is an ethics exam
2. A total of 3 out of 5 confirmatory (competency) examinations
3. Engineering Economics

On January 17, 2000, Mr. Mihaly attempted his first NPPE exam and he failed that exam. On October 16, 2000, Mr. Mihaly was supposed to write the NPPE exam for the second time however he did not appear for the exam. By 2003 Mr. Mihaly had failed to pass the test three time and his application was withdrawn.

In 2006 APEGA reactivated Mr. Mihaly's application and in 2007 Board of Examiners reconsiders his application confirming that he must pass the NPPE Exam, write the confirmatory examinations or the Fundamentals of Engineering Examinations (FE Exams) and must obtain 1 year of Canadian engineering experience. Instead of writing the exam on August 5, 2008 Mr. Mihaly filed a human rights complaint (pursuant to The Alberta Human Rights Act, RSA 2000, c 25.5 [AHRA]) against APEGA with the Alberta Human Rights Commission (AHRC). He alleged that APEGA discriminated against him based on place of origin.

On February 6th, 2014 Commissioner Moosa Jiwaji ruled resoundingly in Mr. Mihaly's favour. The decision of Human Rights Tribunal finding was that the system for evaluating Mr. Mihaly's credentials constituted systematic discrimination. Directed that APEGA to reconsider his application and awarded damages of \$10,000. APEGA was directed by the commission to assist Mihaly to networking and language resources.

3.2. Appeal to The Court of Queen's Bench

On the 20th of November 2014, APEGA, the Appellant, filed the appeal brief to The Court of Queen's Bench. Mr. Mihaly also cross-appealed seeking to increase damages to \$1 million or \$2 million if APEGA would not make him an engineer.

The initial hearing date was set for the 12th of December 2014, but the appeal hearing proceeded on the 23rd and the 24th of July 2015 once the Court received legal submission of requested questions. There are four issues that are brought up by the Appellant for the appeal as outlined in the Reasons for Judgment: (Association of Professional Engineers and Geoscientists of Alberta v. Mihaly, 2016)

1. Procedural fairness: Did the Tribunal breach the rules of procedural fairness when he decided issues that were not raised by or with the parties?
2. Jurisdiction: Did the Tribunal err when he held that he had jurisdiction to determine whether discrimination based on the place a person receives their education constitutes discrimination based on place of origin?
3. *Prima facie* discrimination: Did the Tribunal rely on the correct legal test, and reasonably apply that test, to determine whether Mr. Mihaly had demonstrated *prima facie* discrimination?
4. Justification: Was the Tribunal's decision that APEGA's registration requirements were unjustified unreasonable?

On January 26th, 2016, Honorable Madam Justice J.M. Ross (the Alberta Court of Queen's Bench) over-turned the Human Tribunal's decision ruling that confirmatory exams are a reasonable and justifiable tool for confirming technical knowledge. Court conclude that Human Rights Tribunal's decisions was "rife with logical errors", "finding of facts unsupported by the evidence", and "failure to take into account relevant considerations, unreasonable interpretations of the legislation". Mr. Mihaly's cross-appeal was dismissed as it relates to remedy only, and therefore is "dependent on a finding of *prima facie* discrimination" that the Court found has not been justified. (*Association of Professional Engineers and Geoscientists of Alberta v. Mihaly*, 2016)

3.3. In the Court of Appeal of Alberta

Mr. Mihaly, the Appellant, filed an appeal on the 22nd of February 2016. The appeal was struck off for failure to file the Appeal Records on the 23rd of June 2016. Mr. Mihaly brought forward an application to restore the appeal on the 15th of December 2016. The Court considered a number of factors to determine whether to restore the appeal. On the 10th of January 2017, the Court decides to dismiss the application to restore the appeal due to the fact that Mr. Mihaly provided no explanation for the delay from the appeal being struck off in June and his appeal to restore in December of 2016. Mr. Mihaly had still not prepared the Appeal Record or ordered the transcripts at time of hearing. As well, this matter has been ongoing since 2008, and the "respondent is entitled to have some finality to this matter, which questions its procedures for evaluating foreign credentials." (*Mihaly v. The Association of Professional Engineers, Geologists and Geophysicists of Alberta*, 2017)

4. The Court of Queen's Bench Decision

As mentioned in the background, APEGA submitted an appeal on the 20th of November 2014 of the decision of the Alberta Human Rights Tribunal, which was issued on the 6th of February 2014. The original date for the hearing was rejected by the Court as “it wished to receive submissions on behalf of the Respondent (Mr. Mihaly and Alberta Human Rights Commission) on legal issues raised by the Appellant (APEGA).” (Association of Professional Engineers and Geoscientists of Alberta v. Mihaly, 2016) The submissions of the requested legal issues were filed by the Tribunal on the 19th of March 2015. Submissions by Mr. Mihaly and APEGA were filed on the 10th of April 2015. The hearing for the appeal proceeded on the 23rd and 24th of July 2015.

As explained in the background, four main issues that the Appellant brought up are looked at by the Court and a detailed explanation is provided below of each issue.

1. Procedural fairness: Did the Tribunal breach the rules of procedural fairness when he decided issues that were not raised by or with the parties?

“The Tribunal concluded that examinations assigned by APEGA were not “for the purpose of correcting a perceived academic deficiency” as “required” or “contemplated” by s 8(b)(ii) of the EGPR: Tribunal Decision, at paras 212, 215, 218” (Association of Professional Engineers and Geoscientists of Alberta v. Mihaly, 2016), in the context of considering if APEGA requirements were justified under s 11 of the AHRA. APEGA argues that the interpretation of the EGPR is inappropriate as it does not take into the consideration the disjunctive “or”. APEGA also states that “the Tribunal breached the duty of fairness by saying his decision on grounds that the parties did not advance, and that they were not given an opportunity to address.” (Association of Professional Engineers and Geoscientists of Alberta v. Mihaly, 2016) APEGA refers to *Amacon Property Management Services Inc. v Dutt*, to support their arguments. The problem was that the *Amecon* principle “applied only to new grounds for decision” (Association of Professional Engineers and Geoscientists of Alberta v. Mihaly, 2016). The Courts and the Tribunal are not required to give opportunities to all involved parties to be heard regarding all the points of law that are used or referred to in deciding a case. Therefore, on the basis of procedural fairness, the Court concluded that the Appellant did not establish a breach of the rules of procedural by the Tribunal.

2. Jurisdiction: Did the Tribunal err when he held that he had jurisdiction to determine whether discrimination based on the place a person receives their education constitutes discrimination based on place of origin?

APEGA believes that the tribunal had no right to make decisions on case where educational origins were in dispute. They submitted *Grover v Alberta* (Human Rights Human Rights Commission) as support. They believed that place of origin protection in the Act was not grounds for protected against discrimination for origin of education.

The Court concluded that the Appellant did not establish that the Tribunal lacked jurisdiction. Further the court argued that *Grover v Alberta* was not the best case as it is no longer considered “Good Law” but instead the test set out in *Moor v British Columbia* was a better case. The main point of the test is “consideration of arbitrariness or stereotypical thinking in determining whether a *prima facie* case of discrimination has been made out”. Discrimination “occurs where neutral rule or practice has an adverse impact” but the Act does not specifically list all way discrimination can occur. Thus, APEGA did not prove the tribunal err in hearing the case.

3. *Prima facie* discrimination: Did the Tribunal rely on the correct legal test, and reasonably apply that test, to determine whether Mr. Mihaly had demonstrated *prima facie* discrimination?

“APEGA submitted that the Tribunal had no jurisdiction over Mr. Mihaly’s complaint because the AHRA does not protect against discrimination based upon the “place of origin of academic qualifications.”” (Association of Professional Engineers and Geoscientists of Alberta v. Mihaly, 2016) The Court concluded that the Appellant did not establish that the Tribunal lacked jurisdiction. The “Tribunal had jurisdiction to apply the correct legal test and to determine whether Mr. Mihaly successfully made out a *prima facie* case of adverse effect discrimination.” (Association of Professional Engineers and Geoscientists of Alberta v. Mihaly, 2016)

4. Justification: Was the Tribunal’s decision that APEGA’s registration requirements were unjustified unreasonable?

To establish a *prima facie* case of adverse effect discrimination the Moore test is used. The complainants are required “to show that they have a characteristic that is protected from discrimination: that they experienced an adverse impact; and that the protected characteristic was a factor in the adverse impact.” (Association of Professional Engineers and Geoscientists of Alberta v. Mihaly, 2016) Court found no evidence on *prima facie* discrimination about the APEGA requirements under the Act, both in relation to the confirmatory exams and the NPPE and Canadian work experience. Court held that the Tribunal had no jurisdiction over the APEGA’s the NPPE exam and Canadian work experience requirements, because of no *prima facie* discrimination were established for those requirements.

Reflection and Opinion

Engineers have the potential to cause huge damage to property and negatively impact people's livelihoods. In the most extreme circumstance faulty engineering work has the potential to harm or kill individuals. Engineering in Canada has long history of disaster that include the Quebec Bridge disaster, Ironworkers Memorial and Second Narrows Bridge disaster, and De la Concorde overpass collapse. A recent example of this was faulty engineering work at Rocky Mountain Court in downtown Calgary and the improper engineering of the tailings ponds at Mount Polley Mine. It is from this history of disasters and potential hazards that engineering professional organization arose and continue to be relevant.

Engineering is a Profession which holds at its core the belief that being an engineer is a privilege not a right. With all privileges come responsibilities and expectations. One engineer's actions effect all engineers. No profession wants the reputation of being ambulance chasers or butchers. Cases of misconduct or negligence diminish the public view of the profession as a whole and this impacts each individual engineer's reputation. Professional organizations were created to ensure the public good. In the simplest of ethical arguments APEGA is an altruist organization meant to ensure that moral agents (its members) do not become ethical egoist. Altruism in the simplest terms is doing the most good or least harm. Thus, APEGA not only has a responsibility to the public, but also its past, present and future members, to act in such away that the fewest individuals are harmed by the actions APEGA takes.

Receiving an engineering education in Canada does not automatically mean you will be granted the privilege of being an engineer. It is become increasingly competitive to enter profession programs in Canada so more and more Canadians go abroad to study. Those people are held to the same standards as Mr. Mihaly was expected to meet. Yes, it may discriminate against them because of where they received their education. However, this is a blanket policy that applies to all persons regardless of age, ethnicity, gender, or religion and does not automatically make a person ineligible indefinitely. APEGA provided a remedy for Mr. Mihaly which both protected the public interest and it members but still allows Mr. Mihaly the ability to obtain the privilege of being an engineer. Thus, any harm caused to Mr. Mihaly was short lived and reversible had he taken action.

Furthermore, since being an engineer is a privilege the ownness is on the applicant not APEGA to prove qualifications. Mr. Mihaly has a Master of Science and a Certificate in Engineering from the Institute of Chemical Technology. In Canada a person can take a Certificate in Power Engineering, but this does not make the person a Professional Engineer. They are not even qualified to apply to be an engineer. Furthermore, a Master of Science or Master of Engineering also does not make one qualified to be an engineer. A person with a degree in biology could apply to a Master of Engineering program but this master's degree would not qualify them to be an engineer.

If Mr. Mihaly's arguments are taken a face value *reductio ad absurdum* should not disprove or show flaws in his argument. Consider the following reasonable situation, not *ad absurdum*,

which could and likely has arose: would APEGA be required to accept a Syrian refugee's qualifications at face value? How could their qualifications be verified when the educational institutes or engineering firms no longer exist? Anyone that could reasonable verify these qualifications have likely been dispersed over three continents. Would APEGA be expected to send personnel to Aleppo or refugee camps to find people to corroborate the qualifications? Is it possible to prove the documents are genuine and authentic? If APEGA did grant Professional Engineering status to said person and they were to cause building to collapse what responsibility would APEGA have? Would APEGA be negligent in their responsibility to protect the public? From this line of questions, it become easy to see significant flaws in Mr. Mihaly's arguments.

It appears that the both the Court and the Tribunal did not take into consideration the very real dangers that Mr. Mihaly's argument posed and where it could potentially lead. The Tribunal did not consider or look at the potential harm their decision could create as it would become part of case laws. Although Mr. Mihaly's arguments were directed at the Engineering profession it has far reaching impacts on other profession such as Medicine, Psychology, and Law. Unlike engineering these professions have a long document history of abuse and significant social harm when individuals are given license to practice without being adequately qualified, suitably trained, and without sufficient experience or oversight. Given today global geopolitical climate professional organizations are increasingly being asked to evaluate foreign credentials. No system will be without faults or problems, but a middle ground must be found that protects all.

References

- Alberta Courts. 2018. *Court of Queen's Bench of Alberta*. Retrieved February 08, 2018, from <https://albertacourts.ca/qb/home>
- Alberta Human Rights Commission. 2018. *About the Commission*. Retrieved February 13, 2018, from <https://www.albertahumanrights.ab.ca/about/Pages/about.aspx>.
- Association of Professional Engineers and Geoscientists of Alberta v. Mihaly, 2016 ABQB 61. Retrieved February 09, 2018, from <http://www.apega.ca/assets/PDFs/mihaly-decision.pdf>.
- Mihaly v. The Association of Professional Engineers, Geologists and Geophysicists of Alberta, 2014 AHRC 1. Retrieved from <http://canlii.ca/t/g3051>.
- Mihaly v. The Association of Professional Engineers, Geologists and Geophysicists of Alberta, 2017 ABCA 15. Retrieved February 08, 2018, from <https://www.apega.ca/assets/news-releases/2017-milhaly-court-decision.pdf>.
- Stakeholder. 2018. In *Business Dictionary Online*, Retrieved February 12, 2018, from <http://www.businessdictionary.com/definition/stakeholder.html>.