

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

Title: Mihaly v The Association of Professional Engineers and Geoscientists Report

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1. Introduction

There exists a grey line between individual human dignity and professional associations' obligation to protect the public from harm. This line was clearly illustrated in the case between Mr. Ladislav Mihaly and the Association of Professional Engineers and Geoscientists of Alberta (APEGA). The engineering profession is regulated by APEGA, a statutory association of the *Engineering and Geoscience Professions Act* [1]. APEGA must protect the public's safety and well-being by ensuring all professional engineers and geoscientists practicing in Alberta meet a minimum education and experience standard [1]. Mr. Mihaly applied for a professional engineering license with APEGA after immigrating to Canada from Czechoslovakia. Mr. Mihaly's application was denied three times by APEGA's Board of Examiners, after which Mr. Mihaly filed a complaint with the Alberta Human Rights Commission that APEGA discriminated against him based on his place of origin. The Alberta Human Rights Commission forwarded the complaint to the Human Rights Tribunal which found that Mr. Mihaly had suffered discrimination by APEGA, and that APEGA's actions were not justified under the *Alberta Human Rights Act* [2]. APEGA appealed this finding, which sent the case to the Alberta Court of Queen's Bench. The Court of Queen's Bench agreed that Mr. Mihaly was subject to discrimination by APEGA, but found that APEGA's actions were in fact justified [3]. This paper will outline the stakeholders in this case, the Tribunal's finding in favor of Mr. Mihaly, the Court of Queen's Bench decision, and finally my own reflection on the place for individual human dignity in professional associations.

2. Stakeholders

2.1 Mr. Ladislav Mihaly: Mr. Mihaly was born and raised, and received two Masters degrees in Czechoslovakia. The first degree was an M.Sc. Diploma with a specialization in Technology of Fuels and Thermal Energy from the Technical University in Bratislava which he attended from 1970 to 1975. The second degree was a Certificate in Corrosion Engineering which he received from the Prague Institute of Chemical Technology which he attended from 1977 to 1979 [2]. Mr. Mihaly claims he worked as a Professional Engineer for 25 years in Czechoslovakia. After immigrating to Canada, Mr. Mihaly applied for a professional engineering license with APEGA, a designation he never received. On August 5th, 2008, Mr. Mihaly filed a complaint of discrimination with the Alberta Human Rights Commission against APEGA for denying him registration as a Professional Engineer [2].

2.2 The Association of Professional Engineers and Geoscientists of Alberta (APEGA): APEGA is the association in Alberta that regulates the practices of engineering and geoscience on behalf of the Government of Alberta through the *Engineering and Geoscience Professions Act*. APEGA's main regulatory function is to license individuals and companies that want to practice engineering and geoscience in Alberta [1]. The Association consists of many boards and committees. Of most relevance here is the Board of Examiners which establishes admission standards for the engineering and geoscience professions. The Board of Examiners reviews all applications for membership to APEGA against these standards. Upon revision, the Board of Examiners will approve, defer or refuse each application. Finally, the Board of Examiners develops examination syllabi for engineering and geoscience [4]. Such examinations include the National Professional Practice Examination (NPPE) which is taken by all applicants [2] and "confirmatory

examinations” which applicants may be ordered to take to assess their engineering or geoscience degrees or to correct perceived academic deficiencies [5]. In this case, APEGA acted as the respondent to Mr. Ladislav Mihaly’s complaint of discrimination [2].

2.3 The Canadian Engineering Accreditation Board: The Canadian Engineering Accreditation Board is a board of Engineers Canada. Engineers Canada is the national organization that represents the provincial and territorial associations, such as APEGA, that regulate the engineering profession in Canada [6]. The Canadian Engineering Accreditation Board accredits Canadian undergraduate engineering programs to ensure graduates have the minimum academic requirements to be licensed as a professional engineer in Canada [7]. The Canadian Engineering Accreditation Board will also negotiate Mutual Recognition Agreements (MRAs) with other countries to allow recognition of qualifications between the nations [8]. MRAs are recommended to Engineers Canada by the Canadian Engineering Accreditation Board if the Board determines that the accreditation processes in the agreement countries are similar to the Canadian accreditation process [2].

2.4 The Alberta Human Rights Commission: The Alberta Human Rights Commission (Commission) is the body that carries out functions under the *Alberta Human Rights Act* (Act)[9]. The Act protects Albertans from discrimination and ensures that Albertans are given equal opportunity to work and live, as well as to access services normally available to the public. The Commission’s mandate is “to foster equality and to reduce discrimination.” It does this through public education, resolution of complaints of discrimination, and human rights tribunal and court hearings [9]. Mr. Mihaly filed his complaint with the Commission which then appointed a human rights tribunal to adjudicate the case [10].

2.5 The Human Rights Tribunals: Human rights tribunals (Tribunal) are quasi-judicial tribunals that hold public hearings into human rights complaints [9]. Tribunals deal with complaints of considerable merit that parties cannot settle. The Chief of the Commission and Tribunals appoints either one or three members of the Commission to sit as the panel on the Tribunal. The Tribunal then collects submissions and evidence under oath from both parties and determines whether the complaint has merit. If the complaint does have merit, the Tribunal orders a remedy. Otherwise, the complaint is dismissed. Once a decision is filed by the Tribunal with the Court of Queen’s Bench, it is considered a court decision. The complainant or respondent may appeal the decision to the Court of Queen’s Bench within 30 days of receiving the decision [10].

2.6 The Court of Queen’s Bench of Alberta: The Court of Queen’s Bench of Alberta is a superior court that administers justice and the rule of law in Alberta. The matters that the Court of Queen’s Bench is responsible for are criminal matters, civil proceedings and judicial review of government actions in Alberta. The Court of Queen’s Bench enforces Federal and Provincial legislation [11]. Upon APEGA’s appeal of the Tribunal’s decision, the case was forwarded to the Court of Queen’s Bench for a second examination [3].

2.7 Other Foreign Trained Professionals Immigrating to Alberta: Mr. Mihaly is not the only foreign-trained engineer who has immigrated to Canada and applied for a Professional Engineering license through APEGA. In particular, APEGA receives close to 1500 applications every year

from foreign trained engineering graduates [2]. These applications pass through APEGA's Board of Examiners which assesses the applications [4]. Other foreign trained engineers are stakeholders in this case, as a decision in favor of Mr. Mihaly could have changed the face of engineering regulation in Alberta, and could have made the registration process simpler for foreign engineers.

3. Background

On August 5, 2008, Mr. Mihaly filed a complaint with the Commission declaring that the APEGA discriminated against him based on his place of origin. This complaint was in response to a series of events that denied Mr. Mihaly a license to practice professional engineering in Alberta.

3.1 Mr. Mihaly's Applications: Mr. Mihaly first applied to APEGA for a professional engineering licence in May 1999. Upon review of Mr. Mihaly's application, the Board of Examiners decided his M.Sc. Diploma from the Slovak university was similar to a Chemical Engineering degree in Canada, but that his degree did not meet APEGA's minimum academic requirements. Mr. Mihaly was therefore required to write the NPPE, three confirmatory examinations and take a course or pass an equivalent examination in Engineering Economics by May 2001. On January 17th, 2000, Mr. Mihaly attempted and failed the NPPE examination. He applied to write the NPPE examination a second time but did not attend. Finally, on June 29th, 2001, APEGA withdrew Mr. Mihaly's application as he had not written the confirmatory examinations or completed the Engineering Economics course [2].

Mr. Mihaly's application was reactivated on May 31st, 2002. He was again advised to write the NPPE examination, three confirmatory examinations, and an Engineering Economics examination. Through correspondence with APEGA, Mr. Mihaly expressed that the confirmatory examinations should be waived as he had 10 years of engineering experience [2]. Often, foreign educated applicants may have their confirmatory examinations waived if they have sufficient work experience. However, the Board of Examiners does not only consider the duration of experience, but also requires experience with increasing responsibility and complexity [2]. The Board of Examiners determined that Mr. Mihaly's experience did not demonstrate increasing responsibility and complexity, requiring him to write the confirmatory examinations. Mr. Mihaly attempted and failed the NPPE examination a second time on July 15th, 2002. By August 1st, 2003, Mr. Mihaly had not completed the confirmatory examinations, and his application was withdrawn [2].

Mr. Mihaly's application was reactivated again on October 3rd, 2006. He provided APEGA with an updated resume and reference list. Upon third review of Mr. Mihaly's application, APEGA determined that Mr. Mihaly was required to write the NPPE examination, three confirmatory examinations and the Engineering Economics examination. He was also required to obtain one year of North American engineering experience at a "D level". Mr. Mihaly never took the confirmatory examinations. On August 5th, 2008, Mr. Mihaly filed a complaint with the Commission. This complaint was on the grounds that APEGA's requirements for Mr. Mihaly to become a licensed Professional Engineer were against the Act [2].

3.2 The Test for Prima Facie Discrimination: In 2014, the complaint was brought to the Tribunal. To deliver a verdict in favour of Mr. Mihaly, he was required to prove a case of *prima facie* discrimination [2]. To analyze Mr. Mihaly's evidence, the Tribunal relied on the **Moore** test. In

the *Moore* test, the complainant must prove that they have a characteristic protected from discrimination under the Act, that they experienced an adverse impact, and that the protected characteristic was a factor in the adverse impact [2].

Mr. Mihaly successfully established a case of *prima facie* discrimination. The Tribunal determined that Mr. Mihaly's "characteristic" that should be protected was the origin of his educational credentials; a nexus for place of origin. The Tribunal also determined that Mr. Mihaly experienced adverse impact as he was required to write three confirmatory examinations which Canadian engineering graduates are not required to take. This requirement put Mr. Mihaly at a disadvantage as he was unable to work as a Professional Engineer in Canada. Finally, the Tribunal determined that Mr. Mihaly's place of origin was a factor in the adverse impact he experienced. According to the Tribunal, APEGA initially assumes that foreign trained engineers have qualifications that do not meet Canadian standards and immediately assign confirmatory examinations. Confirmatory examinations create challenges for foreign graduates to become Professional Engineers in Alberta and to work in their field. The requirements imposed by APEGA, including the confirmatory examinations, the NPPE examination and the one year of Canadian experience, were deemed to create significant disadvantage and constitute discrimination. From this analysis, the Tribunal determined that Mr. Mihaly experienced discrimination by APEGA "in the area of service and membership in an occupational association, on the ground of place of origin [2]."

3.3 APEGA's Justification: APEGA chose to justify its standards which discriminate against foreign trained engineers. APEGA was required to prove that the standards were adopted to rationally fulfill APEGA's function; the standards were adopted in good faith; and the standards are reasonably necessary to accomplish APEGA's purpose, meaning APEGA could not have accommodated Mr. Mihaly without incurring undue hardship [2]. APEGA's justification was on the grounds that it regulates the engineering profession to protect the public, and any standards used by the Association are to fulfill that purpose. The standards that APEGA upholds are not only rational, but also enforced by the *Engineering and Geoscience Professions Act* which requires foreign trained engineers to demonstrate the equivalency of their qualifications to Canadian graduates. APEGA explained that changing its standards in a fundamental way to accommodate foreign trained engineers would cause undue hardship as this would force the Association to act outside of its regulatory role [2].

3.4 The Tribunal's Decision: The Tribunal agreed that APEGA's standards are used to fulfill its purpose, and that the standards were adopted in good faith. However, the Tribunal determined that APEGA was using a "one size fits all" approach to determine academic equivalency between foreign and Canadian graduates. APEGA did not individually assess Mr. Mihaly's credentials: APEGA did not review Mr. Mihaly's application by contacting his universities and did not offer Mr. Mihaly any assistance to pass the NPPE examination [2]. The Tribunal also understood that the Board of Examiners will assign confirmatory examinations to correct a perceived academic deficiency. However, the Tribunal found that the confirmatory examinations were assigned to Mr. Mihaly without *individually determining* his academic deficiency. Instead, APEGA simply assigned the examinations upon review of his documents. According to the Tribunal, the Board of Examiners does not individually consider whether a foreign trained engineer could safely practice

engineering, nor does it consider the contributions the applicant could make to the engineering profession [2]. Finally, the Tribunal deemed that APEGA did not sufficiently accommodate Mr. Mihaly in achieving the one year of Canadian engineering experience. From this, the Tribunal found that the Mr. Mihaly experienced unjustified discrimination by APEGA as the examination requirements and experience used to assess Mr. Mihaly's academic credentials were not individualized or accommodating [2].

The Tribunal awarded Mr. Mihaly \$10,000.00 in damages. The Tribunal, among other orders, demanded APEGA to review Mr. Mihaly's transcripts and experience in direct contact with his universities to determine his specific skills, establish a committee to individually assess Mr. Mihaly's qualifications, and match Mr. Mihaly with a mentor of a similar background [2]. APEGA chose to appeal the Tribunal's decision and Mr. Mihaly cross-appealed, thus sending the case to the Court of Queen's Bench. The Court of Queen's Bench determined that Mr. Mihaly did in fact suffer discrimination from APEGA. However, the Court of Queen's Bench found that APEGA could not reasonably accommodate Mr. Mihaly without experiencing undue harm, reversing the Tribunal's decision [3]. Mr. Mihaly appealed the Court of Queen's Bench decision on February 22nd, 2016, sending the case to the Alberta Court of Appeals. However, Mr. Mihaly did not follow up with his appeal application, and failed to properly restore the appeal. As such, the Alberta Court of Appeals decided to dismiss the application [12]. Further details on the Court of Queen's Bench decision are outlined in the next section.

4. The Court of Queen's Bench Decision

APEGA's appeal went to the Court of Queen's Bench on July 23rd and 24th, 2015. The two issues raised during the appeal relevant to this paper are as follows: did the Tribunal use the proper legal test, and did the Tribunal properly apply that test, to evaluate Mr. Mihaly's evidence of *prima facie* discrimination; and was the Tribunal's decision unreasonable [3]?

4.1 The Test for Prima Facie Discrimination: As outlined previously, complainants must provide evidence that they have a characteristic protected from discrimination, that they experienced an adverse impact, and that the protected characteristic was a factor in the adverse impact. Both the Tribunal and the Court of Queen's Bench agreed that Mr. Mihaly was treated as a foreign trained engineer because of the origin of his academic qualifications, which is a nexus for his place of origin. The Tribunal and the Court of Queen's Bench also agreed that APEGA's required confirmatory examinations adversely impacted Mr. Mihaly. Confirmatory examinations are an adverse impact because the candidate must spend time and resources to prepare for and successfully complete the assigned examinations [3].

The Tribunal and the Court of Queen's Bench disagreed on the third factor in establishing *prima facie* discrimination: that the protected characteristic was a factor in the adverse impact. The Tribunal misinterpreted the purpose of the confirmatory examinations when it concluded that APEGA did not properly assess Mr. Mihaly's academic deficiency before assigning him confirmatory exams. However, the purpose of the examinations is to confirm academic qualifications *or* to correct a perceived academic deficiency [3]. The Court of Queen's Bench claims that the Tribunal's conclusion about the confirmatory exams was based on arbitrariness and

stereotyping, and not based on establishing a connection between a protected characteristic and an adverse impact. This means the Tribunal did not properly apply the *Moore* test. Equally, the Court of Queen's Bench determined that the Tribunal's finding that APEGA's examination and experience standards "perpetuate disadvantage and constitute discrimination" was not supported by evidence. Instead, the evidence proved that APEGA does not assume foreign trained engineers have either inferior or superior academic qualifications. In fact, APEGA makes no assumption about a foreign trained engineer's academic qualifications as it does not have enough information about the applicant's institution. Regardless of its disagreement with the Tribunal, the Court of Queen's Bench found a close link between Mr. Mihaly's place of origin and the place of his education. The Court of Queen's Bench also found that Mr. Mihaly could not possibly have avoided the adverse impact of being assigned confirmatory examinations other than moving to Canada to pursue his education. This established that Mr. Mihaly's place of origin was a factor in the adverse impact he experienced [3].

The Tribunal failed to apply the *Moore* test to the two other licensing requirements: obtaining one year of Canadian engineering experience and passing the NPPE examination. All applicants to APEGA are required to meet these standards, regardless of origin of academic qualifications. There was insufficient evidence to prove that Mr. Mihaly's place of origin was a factor in his inability to obtain one year of Canadian experience. Equally, no statistical evidence demonstrated that foreign trained engineering graduates have more difficulty passing the NPPE examination than any other engineering graduate [3].

The Tribunal therefore improperly applied the *Moore* test by including arbitrariness and stereotyping, and failed to address two of APEGA's requirements in the test. From this, the Court of Queen's Bench decided the Tribunal's finding that Mr. Mihaly's place of origin was a factor in the adverse impact he experienced was based on unreasonable assumptions.

4.2 APEGA's Justification: To justify its discriminatory actions, APEGA was required to prove that the standards it imposed on Mr. Mihaly were adopted to fulfill APEGA's function and adopted in good faith. APEGA also had to show that it could not accommodate Mr. Mihaly without experiencing undue hardship. The Tribunal and the Court of Queen's Bench both agreed on the first two points: APEGA has a statutory responsibility to ensure international engineers can competently practice engineering without causing harm to the public. APEGA's standards are therefore adopted in good faith and are rationally connected to its function [3].

The Tribunal found that the requirement to complete confirmatory examinations were not justified. First, Mr. Mihaly should only have been assigned examinations to correct any perceived deficiencies following an individualized assessment of his qualifications. Second, Mr. Mihaly should have been individually assessed, and not assigned a "one size fits all" examination. The Court of Queen's Bench determined that the Tribunal's finding was unreasonable since the Tribunal failed to properly interpret the purpose of the confirmatory examinations [3].

The Court of Queen's Bench also found that the Tribunal's order to better accommodate Mr. Mihaly was unreasonable. The Tribunal failed to properly estimate the cost of appointing a committee to individually assess an applicant. Equally, the Tribunal did not consider the adverse

impact this type of accommodation would have on APEGA. The Court of Queen's Bench mentioned that APEGA would be required to fundamentally change its standards and act outside its regulatory role. APEGA does not have an obligation to change its standards in a fundamental way to make accommodation. However, it does have an obligation to make reasonable accommodation to allow properly trained and skilled workers to do their work [3].

From the Tribunal's unreasonable finding of *prima facie* discrimination and its refusal to recognize APEGA's justification, the Court of Queen's Bench finally decided to reverse the Tribunal's decision and rejected Mr. Mihaly's cross-appeal [3].

5. Reflection and Opinion

It is without question that APEGA must abide by the Act and do everything in its power to uphold the human rights of any person or group involved with the Association. However, as a professional regulatory association, APEGA is required to discriminate against individuals based on the origin of their academic qualifications. The Mihaly vs. APEGA case therefore implores the question of whether APEGA, as a regulating agency for the engineering profession, can create space for individual human dignity within its fundamental mandate.

APEGA's mandate is to protect public safety and well-being through regulation of the engineering profession. This means APEGA, through establishing admission standards, ensures that only competent professionals may practice professional engineering in Alberta. Equally, only registered companies may undertake engineering or geoscience projects [1]. This way, no unskilled or incompetent person may compromise the public's safety or well-being through poor engineering practice. I would argue that APEGA's mandate is therefore to protect the human rights of the public. Embedded within the Act is the concept of human dignity. The Act states: "WHEREAS it is recognized in Alberta as a fundamental principle and as a matter of public policy that all persons are equal in: dignity, rights and responsibilities... [13]."

Riley and Bos [14] outline human dignity as denoting "the special elevation of the human species, the special potentiality associated with rational humanity, or the basic entitlements of each individual." I believe human dignity implies that individuals have sanctity and autonomy, and that individuals may flourish and achieve their fullest potential. My definition of human dignity means individuals may make choices which allow them to reach their fullest potential. Equally, my interpretation of human dignity implies there are no unsurmountable obstacles or challenges that impede individuals from making these choices or from reaching their fullest potential.

Implicitly, APEGA's mandate states that APEGA will both create opportunity for the public to reach its fullest potential and protect the public from harm that could be an obstacle in reaching this potential. I also argue that APEGA's use of the term "public" includes the public as a group and all individuals that comprise the public. Through its licensed engineers, APEGA provides technology, energy, infrastructure and opportunity which allow the public to reach its fullest potential. In this way, APEGA upholds the public's human dignity. Equally, should APEGA's engineers design technology or infrastructure that could physically or mentally harm the public, the public would face an obstacle in reaching their fullest potential. This would be an attack on the public's human dignity.

So I beg the question, did APEGA find space in its mandate to create opportunity for Mr. Mihaly, an individual in the public, to achieve his fullest potential? I would certainly argue that APEGA did not create opportunity for Mr. Mihaly to reach his fullest potential. As Mr. Mihaly did not have a professional engineering license, he was unable to find senior-level employment. Equally, Mr. Mihaly was unable to find junior-level employment as he had 10 years' experience. According to Mr. Mihaly, this caused himself and his family extreme financial and emotional burden. APEGA clearly created an obstacle for Mr. Mihaly that was disproportionate to the obstacles Canadian engineering graduates face to become licensed professionals. This caused Mr. Mihaly harm and pain, and was most certainly a belittlement of his human dignity.

However, is Mr. Mihaly's individual dignity more valuable than the public's human dignity? To answer this, I would like to examine the situation where the Court of Queen's Bench did not reverse the Tribunal's decision, and Mr. Mihaly was granted a professional engineering license. With a license to practice engineering, Mr. Mihaly likely would have found a senior-level position in his field. What is the possibility that Mr. Mihaly would have made a tragic error, endangering the public's well-being and safety? Equally, what is the possibility that Mr. Mihaly could have provided for his family both financially and emotionally from his employment? I would argue that the latter situation is more likely. In providing for his family and reaching his fullest potential as an engineer, Mr. Mihaly's individual human dignity would have been upheld. Is it worth upholding Mr. Mihaly's individual dignity if there is a potential he could cause harm to the public's well-being and safety, and consequently the public's human dignity? I believe that this is the dilemma faced by APEGA, the Tribunal and the Court of Queen's Bench.

The Tribunal's decision implied that Mr. Mihaly's human dignity was more valuable than protecting the public against potential harm. I recognize that by APEGA's discrimination, Mr. Mihaly's human dignity was attacked. However, I disagree that his individual human dignity is more valuable than the entire public's well-being. I also disagree with the Tribunal's finding that APEGA does not individually assess foreign trained engineering applicants. I believe APEGA already makes sufficient effort to accommodate foreign trained engineering graduates through MRAs and potential exemption from confirmatory examinations given sufficient engineering experience. I therefore do not believe that APEGA should make further accommodation for applicants with foreign academic qualifications. I therefore agree with the Court of Queen's Bench decision. I believe the public's safety and well-being should take precedence over an individual's human dignity.

Although APEGA did not create space for individual human dignity in its mandate, it maintained its function of regulating the engineering profession. To reasonably fulfill its function, APEGA must maintain high admission standards. APEGA must therefore discriminate against applicants whose academic qualifications are unknown to the Association. Also, APEGA will diminish the human dignity of individuals who cannot meet these standards. This is clearly not just for the individuals under scrutiny. However, I believe APEGA is justified and reasonable in placing the public's safety and well being, and indirectly the public's human dignity, above the human dignity of an individual.

6. References

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