

ENGG 513-Winter 2018

The Role & Responsibilities of the Professional Engineer in Society

Mihaly v. The Association of Professional Engineers, Geologists and  
Geophysicists of Alberta, 2014 AHRC 1

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## **Introduction**

This report is an analysis on “Mihaly v. The Association of Professional Engineers, Geologists and Geophysicists of Alberta, 2014 AHRC 1 [1].” This case is about how a foreign-trained Engineer, Mr. Ladislav Mihaly, applies to APEGA for a Professional Engineer membership only to find out that he must pass several exams before receiving the membership. After failing the National Professional Practice Exam, Mr. Ladislav Mihaly, files a complaint with the Alberta Human Rights Commission alleging that APEGA had discriminated against him based off of place of origin. In this report, I will summarize the proceedings, provide a detailed analysis of the decision made by the Court of Queen’s Bench and present my opinion on a few matters. In this report, I will also incorporate some of the rules that have been created by APEGA such as the Closed licensing law as well as general Human rights laws

## **Stakeholders**

### **APEGA**

The Association of Professional Engineers and Geoscientists of Alberta, also known as APEGA, is a self-regulating organization that has been accused of discrimination by Mr. Ladislav Mihaly. Created in 1920, APEGA is an organization that license’s professional, maintains standards and investigates/disciplines its members when necessary [2]. APEGA is a very important stakeholder as it is appealing the Alberta Human Rights Commission’s conclusion that they discriminated against Mr. Ladislav Mihaly.

### **Mr. Ladislav Mihaly**

Mr. Ladislav Mihaly is the foreign-trained engineer who files a complaint against APEGA under the allegation that APEGA had discriminated against him due to his place of origin. Mr. Ladislav Mihaly, who has more than years of experience, wants to be registered as a Professional Engineer but according to the rules that govern APEGA Mr. Ladislav Mihaly must write a few exams to show his credibility. He is one of the main stakeholders because he is the one who filed the initial complaint.

### **The Alberta Human Rights Commission**

The Alberta Human Rights Commission is a non-judicial organization that has the authority to interpret law. In this case, Mr. Ladislav Mihaly, files a complaint to this body alleging that he was discriminated against. After hearing the complaint and the defense, this particular body orders APEGA to accommodate the foreign-trained engineer. This commission is an important stakeholder because while it supported the allegation of discrimination, its decision was appealed and overthrown.

### **The Court of Queen’s Bench**

The Court of Queen’s Bench is the “Superior Trial Court for the province [3]”. It was to this court that the case was first appealed to by both parties—APEGA and Mr. Ladislav Mihaly. This

court is an important stakeholder because it confirms that APEGA had not discriminated against anyone and reverses the decision that was made by the tribunal. Furthermore, Mr. Ladislav Mihaly then tries to appeal the decision made by the Court of Queen's Bench which then gets judged by the Alberta Court of Appeal.

### Moosa Jiwaji

Moosa Jiwaji resided the tribunal chair of the Alberta Human Rights Commission. He is the individual who had the final word in the tribunal and concluded that APEGA had not done enough to accommodate Mr. Ladislav Mihaly. He also suggested that the Examinations Standards and Experience Standards that APEGA had set were discriminatory. He is a very important stakeholder because the decision he made could have put many lives in danger. His decision would go on to be judged in the Court of Queen's Bench, and the Alberta Court of Appeal. According to [4] he no longer resides the Commission.

### Mark Tokarik

Mr. Mark Tokarik used to work as the Assistant Director of Registration and then became the Deputy Registrar for APEGA [5]. He acquired his Bachelor of Science in Engineering in 1981 [5]. Mr. Mark Tokarik is an important stakeholder because he was in contact with Mr. Ladislav Mihaly before he filed a complaint. His experience and communication would serve as evidence in this case.

### Foreign-trained Engineers

Foreign-trained Engineers are also very important stakeholders because depending on what the Courts decide their livelihoods would be impacted. If the Courts rule that APEGA was being discriminatory there could possibly be a plethora of Foreign-trained Engineers who want settlements. Similarly, those universities who had followed APEGA's current procedures would also want settlements.

## **Background**

### Mr. Ladislav Mihaly's Application

Mr. Ladislav Mihaly, who was born in former Czechoslovakia, applied to APEGA to obtain a membership as a Professional Engineer in May 1999 [1]. In his application, Mr. Ladislav Mihaly, pointed out that he has two Masters degrees from Czechoslovakia [1]. He states that in 1975, he graduated from the Slovak Technical University in Bratislava as a M.Sc. Diploma with a specialization in Technology of Fuels and Thermal Energy [1]. In the year 1981, he graduated from "the Institute of Chemical Technology (ICT) in Prague as a Certificate in Corrosion Engineering [1]." In addition to this academic qualification, Mr. Ladislav Mihaly claims that he has 12 years of international work experience and even used to teach his colleagues [5].

APEGA accepted the application, and informed him that he was required to take the National Professional Practice Exam (NPPE) [1]. Once APEGA had analyzed Mr. Ladislav Mihaly's

transcripts, experience, and reference questionnaires, they realized that Mr. Ladislav Mihaly's experience and academic credentials may not be up to APEGA's standards [1]. APEGA informed Mr. Ladislav Mihaly that he would have to take an exam in Engineering Economics and complete three confirmatory exams by May 2001 since his degrees are on the Foreign Degree List [1]. On January 17, 2000, Mr. Ladislav Mihaly took the NPPE but failed [1]. He then applied to write the exam again but failed to attend the test [1]. Mr. Ladislav Mihaly was later notified by APEGA that because he failed to write the confirmatory exams by the deadline, they withdrew his application to register as a Professional Engineer [1].

About a year later, Mr. Ladislav Mihaly informs APEGA that he was involved in a car accident and so he could not respond to APEGA on time [5]. APEGA acknowledged this situation, reactivated the registration process in light of Mr. Ladislav Mihaly's plea, and requested him to complete the, "three confirmatory examinations by May 2003 and the Engineering Economics exam by November 2003 [5]."

At this point in time, Mr. Ladislav Mihaly, raises some concerns he has regarding the validity of decision APEGA made despite knowing how much experience he has as an engineer. According to Mr. Tokarik of APEGA, Mr. Ladislav Mihaly was asking for waiver because he has worked as an engineer for more than 10 years [5]. In response to this he sent Mr. Ladislav Mihaly a Reconsideration and Appeal Sheet [5]. Mr. Ladislav Mihaly had not filled out the appeal sheet, he failed his NPPE exam and failed to write the three confirmatory exams before the deadline [5]. Thus, APEGA deactivated his file for APEGA membership as a Professional Engineer [5].

On October 3<sup>rd</sup>, 2006 Mr. Ladislav Mihaly once again requests APEGA to reactivate his account. APEGA agrees to do this as long as he provides an updated resume and updated references [5]. APEGA accepted this application but concluded that Mr. Ladislav Mihaly will have to take the three confirmatory exams, and a "course/exam in Engineering Economics or the Fundamentals of Engineering Examination [5]." They also concluded that the one year experience that Mr. Ladislav Mihaly had claimed to have was not of the North American D-level and thus did not count [5]. For the fourth time, Mr. Ladislav Mihaly failed to write or pass the required examinations and on "...August 5, 2008, he filed a complaint with the Commission [5]..." claiming that he had been discriminated against.

#### Alberta Human Rights Commission's Decision

Mr. Ladislav Mihaly claimed that under ss. 4, 7, and 9 APEGA had discriminated against him (a) as they had excluded him from a membership, and (b) "...with respect to goods, services, accommodation or facilities that are customarily available to the public [5]" because of his place of origin.

The tribunal concluded that Mr. Ladislav Mihaly had successfully established that he was discriminated against based off of his place of origin and awarded him 10, 000\$ [5]. They further stated that the Examination Standard as well as the Experience Standard used by APEGA—not allowing for individualized testing—dictated discrimination [5]. The tribunal claims that APEGA should have done more to accommodate Mr. Ladislav Mihaly and ordered them to (a) reach out to the University that Mr. Ladislav Mihaly had graduated from and invest its resources

in determining the Universities academic standard, (b) allow Mr. Ladislav Mihaly to challenge APEGA's decision on having to write the exams, (c) create a more individualized set of examinations, (d) try to help Mr. Ladislav Mihaly face his adversities as an engineer by pairing him with a mentor who has a similar background, (e) help Mr. Ladislav Mihaly by directing him towards other foreign-trained engineers in Canada for networking purposes, and (f) find community resources that could potentially improve his fluency in English [5].

### The Court of Queen's Bench's Decision

Points that were raised in the appeal by APEGA included (a) whether the Tribunal breached procedural rules when deciding on matters that were not raised by the other party, (b) whether the Tribunal erred in the judgment of whether discrimination based off of the place an individual receives their education includes discrimination based off the place of origin, (c) whether the tribunal correctly analyzed whether Mr. Ladislav Mihaly had sufficient evidence of this allegation, and (d) whether the Tribunal was claiming that APEGA's registration rules "were unreasonable [1]."

For point (a), the Court concluded that APEGA did not provide sufficient evidence to prove this point when they had the opportunity to do so in front of the Alberta Human Rights Commission. Therefore, they had not established a violation in procedural fairness [1].

For point (b), Mr. Ladislav Mihaly was required to prove that he had a characteristic that was protected from discrimination. The Court of Queen's Bench claimed that since place of origin is something that is protected from discrimination, the Alberta Human Rights Commission had committed justice to this particular point [1].

For point (c), Mr. Ladislav Mihaly claimed that he had faced adverse influences. According to the Tribunal the very fact that he had to write exams—spend time and money on the preparation—was an adverse impact [1]. The Court of Queen's bench concluded that the decision made by the Tribunal was indeed correct [1].

For point (d), the Court of Queen's bench found that the Alberta Human Rights Commission Tribunal did not provide sufficient evidence to suggest that the rules and requirements of registering under APEGA were discriminatory [1].

Mr. Ladislav Mihaly did not agree with this decision and files an appeal.

### Alberta Court of Appeal's Decision

In order to follow through with the appeal, the Alberta Court of Appeal requires the appellant to (a) have an "arguable merit to the appeal [6]", (b) reason for delay in restoring the appeal, (c) reason for not promptly dealing with the delay, (d) have the "intention in time to proceed with the appeal", and (e) "lack of prejudice to the respondents (including length of delay) [6]". The Alberta Court of Appeal concluded that Mr. Ladislav Mihaly did not meet criteria (a)-(d) and thus this appeal would not be restored [6].

## **The Court of Queen's Bench Decision**

### **How important is Safety?**

The Alberta Human Rights Commission, the Court of Queen's Bench, and the Alberta Court of Appeal unanimously agree that the concept of safety is of paramount importance [1-3]. The Court of Queen's Bench agrees with the Tribunal when they stated that the, "statutory responsibility for the registration of international engineers to assure itself of their competency to practice in Alberta without causing harm to the public [1]." This falls directly in line with the APEGA Code of Ethics Rule of Conduct (1), which states, "Professional engineers and geoscientists shall, in their areas of practice, hold paramount the health, safety and welfare of the public and have regard for the environment [7]." It is safe to conclude that all three judicial bodies acknowledge this fact.

### **Alberta Human Rights Commission's Order**

The issues begin to arise when the Alberta Human Rights Commission makes the claim that APEGA did not do enough to accommodate Mr. Ladislav Mihaly [5]. As stated in the previous section, the Alberta Human Rights Commission wanted APEGA to invest a more significant amount of resources in accommodating Mr. Ladislav Mihaly [5]. The Court of Queen's Bench found that these orders went "beyond the scope of any discriminatory conduct found or even alleged [1]." According to the Alberta Human Rights Commission, APEGA would have to deal with cases similar to Mr. Ladislav Mihaly's case about 375 times a year. Thus, if every case was to be treated in an individualized manner then, according to the Court of Queen's Bench, a significant and unreasonable investment of resources would be required [1]. In addition, as pointed out in [1], employers are not required to change their "working conditions in a fundamental way" as this would create a situation of undue hardship.

### **Significance of Standardized Exams**

As stated earlier the ultimate purpose of these registration rules that APEGA has created are to ensure the "...health, safety and welfare of the public... [7]." For this to occur a standard by which everyone is judged must be created. Universities from all around the world can apply for something known as a Mutual Recognition Agreements (MRA's) with Canada [5]. Once the application for this agreement is filled, the Canadian Engineering Accreditation Board (CEAB), in collaboration with the respective foreign University, invests a significant amount of time, effort, and resources, to conclude whether the academic standards of the two countries are the same [5]. If the foreign Universities meet the required standards, then their graduates are not required to write any exams [5]. Unfortunately, the Slovak Technical University of Bratislava had never even applied for such accreditation and thus, all applicants from that University are required to take the confirmatory or FE exams [5]. Furthermore, according to Court of Queen's Bench, APEGA assigned the confirmatory or FE exams to Mr. Ladislav Mihaly not because they were aware of his academic deficiencies but rather because they wanted to find out more about his academic credentials [1]. This was the only way APEGA could determine whether Mr. Ladislav Mihaly was "competent to perform [1]" as a Professional engineer without spending a significant amount of resources—thus creating a situation of undue hardship [5].

It should be noted that FE exams have a pass rate of 85% and APEGA claims that foreign-trained engineering graduates of entry level competence should have no issue passing the exam [1]. As far as challenging the decision to write the exams is concerned, it should be noted that Mr. Ladislav Mihaly did not even write the confirmatory exams. Since he did not write these exams it is difficult to conclude whether Mr. Ladislav Mihaly was discriminated against [1]. Thus, the Court of Queen's Bench overruled the tribunal's decision to accommodate Mr. Ladislav Mihaly any further and concluded that the exams Mr. Ladislav Mihaly had to take were fair [1].

### Exempt from Exams

As stated earlier, Mr. Ladislav Mihaly claimed that he had close to 12 years of international experience [5]. Under normal circumstances an internationally educated engineer is required to take confirmatory exams if they are not part of the MRA [1]. However, if the engineer has more than 10 years of quality experience, then such exams are waived [8]. Mr. Ladislav Mihaly having more than 10 years of experience should have resulted in the exams being waived. However, APEGA concluded that the experience Mr. Ladislav Mihaly had gained over the years was not one requiring high levels of "responsibility or complexity [1]". Therefore, the rule stating that exams could be waived for seniors with 10+ years of experience did not apply to Mr. Ladislav Mihaly. Either way, Mr. Ladislav Mihaly was given the opportunity to appeal this decision but did not do so promptly.

### Requirements for Discrimination

The Court of Queen's Bench pointed out that in order for Mr. Ladislav Mihaly to successfully claim that he has been discriminated against he would have to establish at least three things [9]. The first thing that he would have to establish is whether "...he has a characteristic that is protected from discrimination [9]" by law. Both the Alberta Human Rights Commission and the Court of Queen's Bench agreed that Mr. Ladislav Mihaly satisfied this condition since place of origin is something that is protected [1].

The second thing that he would have to establish is whether "he experienced an adverse impact [9]" in this process. Mr. Ladislav Mihaly established that the very fact that he had to prepare for and spend his resources on writing the exam was an adverse impact [5]. Both the Alberta Human Rights Commission and the Court of Queen's Bench agreed on this [1].

The third thing that Mr. Ladislav Mihaly was required to establish was whether the protected characteristic was in direct correlation with the adverse impact that he had [1]. While the Court of Queen's Bench agreed that he was facing adverse impacts because he was educated in a foreign country, for the following reasons, this was not enough to suggest discrimination had taken place:

- All applicants are required to take these exams [9].
- There is no evidence suggesting that failure occurred because he was born in a foreign country [9].
- Difficulty in finding a job—because he had more than six years of experience in a junior position—does not correlate to place of origin [9].

In the end, the Court of Queen's Bench concluded that because the decision made by the Alberta Human Rights Commission was unreasonable and illogical, it should be reversed.

## **Reflection and Opinion**

Do you agree with the decisions of the Alberta Human Rights Commission, the Court of Queen's Bench, and the Alberta Court of Appeal? Why or why not?

I disagree with the final decision made by the Alberta Human Rights Commission because not only does their decision overlook the matter of undue hardship but it also seems to undermine the safety and welfare of the public. Once again, safety is of utmost importance, as suggested in APEGA's Code of Ethics Rule of Conduct (1), "Professional engineers and geoscientists shall, in their areas of practice, hold paramount the health, safety and welfare of the public and have regard for the environment [7]." It should be noted that the tribunal acknowledged that the "FE exams are developed to assure competency of professional engineers, and thus, public safety [1]." Despite this, the tribunal tries to prove its point by claiming that FE exams are too standardized—in other words, one size fits all [1]. I disagree with this because evidence suggests that 85% of foreign engineer graduates that take these exams pass [1]. Mr. Ladislav Mihaly's failure on passing the exams suggests that he does not have basic level of understanding of his discipline. I believe that the tribunals conclusion was "...rife with logical errors, findings of facts that are not supported by the evidence, and failures to take into account relevant considerations [6]."

I agree with the Court of Queen's Bench, because they have put a lot of emphasis on the safety and welfare of the public. Clearly, it is because of safety concerns that the confirmatory and FE exams exist. Not taking part in these exams or failing them shows "Incompetence" and may result in "Professional Misconduct", "Negligence", and/or "Breach of the Code of Ethics", thus resulting in a "Conviction of Offence" [7]. In addition, the requirement set by APEGA, to have at least four years of experience—one of which is Canadian, has been created so that the employees do not make the above mistakes. Furthermore, I also agree with the Court of Queen's Bench when they state that Mr. Ladislav Mihaly's place of origin (a) played no role in employers not wanting to hire engineers with more than 6 years in a junior position—since anyone can face this issue and (b) did not affect the results of the exams because many other foreign engineers have passed. Thus, there was no discrimination.

In addition to the reasons mentioned above, I agree with the decision of the Alberta Court of Appeal, because Mr. Ladislav Mihaly seems to have delayed or missed deadlines several times throughout this process [6]. Not only was this case but, he also did not attempt to remedy the situation promptly [6]. Thus, after considering all of the above factors, I conclude that the Alberta Human Rights Commission had erred in their conclusion and that the Court of Queen's Bench and the Alberta Court of Appeal made the correct decision.

Should APEGA accommodate foreign-trained engineers and geoscientists? Why or why not? If yes, how should APEGA accommodate foreign-trained engineers and geoscientists?



I believe that APEGA should only accommodate foreign-trained engineers if they have the resources to accommodate all such applicants. This would ensure equality amongst all applicants and support ss. 4, 7, and 9 of the Alberta Human Rights Act. I agree with the Court of Queen's Bench when they state that the amount of resources required to fund such accommodations are unreasonable. It should be noted that it is not the responsibility of the employer to make sure that the employee receives perfect accommodation, nor is it the responsibility of the employer to change the fundamentals of the company in order to accommodate the employee. I believe, that the amount of resources that would have to be spent to accommodate not only Mr. Ladislav Mihaly but many of the other foreign-trained engineers would create undue hardship for APEGA. Therefore, in its current state APEGA should not accommodate foreign-trained engineers.

## References

- [1] “Mihaly v. The Association of Professional Engineers, Geologists and Geophysicists of Alberta, 2014 AHRC 1.” <http://www.apega.ca/assets/PDFs/mihaly-decision.pdf> [February 1st, 2018]
- [2] Dr. Denis Onen, Online Lecture, Topic: “Introduction to the Professions.” Online, January 21<sup>st</sup>, 2018.
- [3] “Alberta Courts.” <https://albertacourts.ca/qb/home> [February 10th, 2018]
- [4] “Alberta judge who handed down controversial ruling on engineer professional standards no longer at Human Rights Commission.” <http://nationalpost.com/news/canada/alberta-judge-who-handed-down-controversial-ruling-on-engineer-professional-standards-no-longer-at-human-rights-commission> [February 10th, 2018]
- [5] “Mihaly v. The Association of Professional Engineers, Geologists and Geophysicists of Alberta, 2014 AHRC 1.” <https://www.canlii.org/en/ab/abhrc/doc/2014/2014ahrc1/2014ahrc1.pdf> [February 1st, 2018]
- [6] “Mihaly v. The Association of Professional Engineers, Geologists and Geophysicists of Alberta, 2014 AHRC 1.” <https://www.apega.ca/assets/news-releases/2017-milhaly-court-decision.pdf> [February 5th, 2018]
- [7] Dr. Denis Onen, Online Lecture, Topic: “Regulation of Engineering and Geoscience.” Online, January 22<sup>nd</sup>, 2018.
- [8] Dr. Denis Onen, Online Lecture, Topic: “Disciplinary Powers and Procedures.” Online, January 23<sup>rd</sup>, 2018.
- [9] Steve T. Eichler, Online Lecture, Topic: “Human Rights.” Online, February 15<sup>th</sup>, 2018.