

MIHALY V. APEGA CASE REPORT



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ENGG 513

The Role and Responsibilities of the
Professional Engineer in Society

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1 Introduction

1.1 Purpose of the Report

This report was prepared to review contemporary and relevant events pertinent to the professional engineering (P.Eng.) license accreditation process through The Association of Professional Engineers and Geoscientists of Alberta (APEGA). The report provides insight in the decision-making process utilized by APEGA in awarding P.Eng. designations. In Canada, individuals that practice engineering or maintain the title of engineer are required to hold an engineering license in the province or territory of practice [1]. However, engineering licensing bodies such as APEGA do not exist in a legal vacuum they may be challenged by individuals or other civil entities. This report focuses in one such challenge to APEGA's accreditation process initiated by Mr. Vladislav Mihaly citing a violation of Alberta's Human Rights Act, a case first brought up in front of Alberta's Human Rights Commission (AHRC) then challenged The Court of Queen's Bench in Alberta (CQBA) – the superior trial court for the province.

1.2 Brief Overview of the Case

Canada is a nation that uses a “point system” in selecting immigrants – along with other immigration pathways [2]. This results in the attenuation of foreign-educated persons in the country. As one such individual, Mr. Mihaly finished his education in 1981 in the former Czechoslovakia. He immigrated to Alberta in 1999 where he started the application process needed to retain his former professional license as an Engineer. Having been recognized as deficient in some academic areas by APEGA, he was advised to take confirmatory examination should he still pursue licensing. Although examination attempts were made, this relation between the parties lasting until 2008 culminated in the filing of a complaint with AHRC [3]. This decision was later contested by APEGA in The Court of Queen's Bench of Alberta resulting in the reversal of AHRC's decision and maintaining APEGA's decision in the matter in 2015 [4].

2 Stakeholders

2.1 APEGA

As a legislating body, APEGA is mandated to “regulate the practice of engineering and geoscience in Alberta” (CQBA 2016). This organization is created pursuant to the Engineering and Geoscience Professions Act (EGPA) that aims to standardize the profession to an advanced level of competence and professionalism in large part to protect public's interest. Since engineering is a regulated profession in Canada, the EGPA outlines the requirements for an individual to qualify for the title of professional engineer. In particular to this case the direct integration of internationally educated graduates (IEGs) is undertaken through Mutual Recognition Agreements (MRAs) between countries whereby academic programs are reviewed for equivalency by the Canadian Engineering Accreditation Board (CEAB). Should an IEG's education not come from the aforementioned institutions, APEGA may review their individual case for academic and professional equivalency, and make recommendations prior to licensing. A breakdown of this system would undermine the structure and rigidity of the engineering

profession risking less than optimal practice and ultimately jeopardize the public's interest [5]. To this end APEGA deemed AHRC's decision in this case as a challenge to regulating the engineering profession and challenged it in the CQBA.

2.2 The Court of Queen's Bench of Alberta

The CQBA is the judicial entity superseded only by Alberta's Court of Appeal and the Supreme Court of Canada. This court may pass judgment over laws such as the Alberta Human Rights Act and the Engineering and Geoscience Act [6]. Precisely these two came to clash in this case of Mihaly and AHRC v APEGA, which is a challenge to a decision made by the AHRC. Any judgment made by this court does not exist in a vacuum however, since the Canadian judicial system subscribes to the common-law tradition, the ruling of this court, if uncontested, may be used as precedence in future trials [7]. So the consequences of the CQBA's decision may have far-reaching in this subject. As is evident by the decision of this trial [4], the court in jurisprudence needed to address the judgment on prima face discrimination raised by the AHRC's, before affirming APEGA's right to administer any required academic exams to applicants.

2.3 The Alberta Human Rights Commission

The AHRC is the entity created by and for the upholding of the Alberta Human Rights Act. This organization champions a two-fold mandate of fostering equality and reducing discrimination [8]. In this case the AHRC was involved by Mr. Mihaly following reports of discrimination in his application as an IEG for a P.Eng. license to APEGA. In particular, the commission used the grounds of prima face discrimination to argue that APEGA's testing requirements are unfairly targeted towards IEG's such as Mr. Mihaly. If the verdict from the AHRC would be upheld then a legal precedence would be reinforced stating that discrimination on a person's origin of education is equivalent to discrimination to the person's origin.

2.4 Mr. Ladislav Mihaly

The stakes for Mr. Mihaly are certainly high. It is absolutely understandable that he would want his many years of education culminating in what he believes to be a master's in Corrosion Engineering and years of engineering practice to be recognized in the country decided to uproot his life to [4]. As detailed by the AHRC decision, certification for IEGs not only allows for a bigger paycheck but also for increased self-esteem, self-worth, and financial security for their families. Mr. Mihaly saw APEGA's requests for equivalency examinations as a barrier imposed to him due to his background. As the AHRC supported, this barrier to attain his license was recognized as unfair and discriminatory, and brought forth due to discrimination against Mr. Mihaly's origin of education.

2.5 Internationally Educated Graduates (IEGs) in Canada

A clear distinction must be made in this category. Since APEGA provides a multitude of ways IEGs may attain their professional designation, such as MRAs, Foreign Degree List (FD List) easements, academic testing, etc., it would be incorrect to say that all IEGs would have the same stake in this decision, save some troubles they might have already undertaken in their

certification [4]. Future IEGs, the IEGs that have given up due to, or are currently in the process of completing their APEGA-mandated examinations, would have a clear interest in the easing of APEGA's designation criteria. The verdict of this case would definitely increase the number of P.Eng. or P.Geo. license holders in the province as many IEGs see it too daunting and too much of an investment to attain their APEGA designations.

2.6 Engineering Companies

Companies employing engineers would definitely be impacted by the decision of easing academic testing requirements for IEG. If the number of professional engineers and geoscientists in the labor market increased it would logically follow that the cost of hiring an engineer or geoscientist would decrease. This would be a positive effect for the bottom line of Alberta's engineering companies.

No statement regarding quality of work is addressed as:

- a) licensing easements should come with professional quality retention
- b) companies must fill in the gaps through their internal QA/QC procedures

2.7 The Public

Without a doubt the public is the most important stakeholder in this case. In fact the mission statement quoted directly from the APEGA website states: "Regulate the practices of engineering and geoscience to serve the public interest in Alberta" [9]. Safety, competence, and ethics would be the major interests that the public would have in this case. We cannot state with certainty whether the public interest would be jeopardized by the upholding of AHRC's decision, as it depends on the implementation of AHRC's recommendation. But what we can say for sure is that no risk to public safety was accepted by the CQBA's decision to maintain the status quo. This speaks to the magnitude of regard that Alberta's judicial system has for public safety which is that they are willing to retain a licensing system challenged by AHRC, to avoid any chance of harm to the public's interest by perturbation APEGA's rigorous licensing system.

3 Background

In summary, the Mihaly v APEGA case can be divided into three segments: First, Mr. Mihaly's application to APEGA that led to his complaint with AHRC; second, the decision of AHRC on the case; third, the appeal by APEGA and cross-appeal by Mr. Mihaly on the Tribunal Decision, leading to the decision of the Court of Queen's Bench.

3.1 History of Case Leading to Complaint

3.1.1 Mr. Mihaly's Background and Application

Mr. Ladislav Mihaly applied to APEGA to register as a Professional Engineer in May of 1999, after he immigrated to Canada from former Czechoslovakia [3]. In his application, Mr. Mihaly provided three references of his employers from Bratislava, his M.Sc. Diploma with specialization in Technology of Fuels and the Thermal Energy from the Slovak Technical

University in Bratislava, and his Certificate in Corrosion Engineering from the Institute of Chemical Technology in Prague [3].

3.1.2 APEGA's Evaluation of Mr. Mihaly's Application

Upon receiving Mr. Mihaly's application, APEGA required Mr. Mihaly to write the National Professional Practice Exam (NPPE) [3]. Mr. Mihaly wrote the NPPE and failed in January of 2000 [3]. In February of 2000, after APEGA's Board of Examiners examined Mr. Mihaly's experience, education, and references, APEGA decided that Mr. Mihaly needed to pass the NPPE and three more confirmatory examinations along with a course or equivalent exam in Engineering Economics by May of 2001 [3]. Mr. Mihaly signed up to write the NPPE in August of 2000, however he did not go to write it [3].

3.1.3 First Withdrawal and First Reactivation of Application

In June of 2001, APEGA withdrew Mr. Mihaly's application as he did not write the required examinations by the deadline given [4]. In May 2002, APEGA reactivated Mr. Mihaly's application for registration upon Mr. Mihaly's request [4]. APEGA required Mr. Mihaly to complete the three confirmatory examinations by May of 2003, and a course or equivalent exam in Engineering Economics by November of 2003 [4]. Mr. Mihaly wrote the NPPE twice in July of 2002 and January of 2003, and failed both times [3].

3.1.4 Second Withdrawal and Second Reactivation of Application

In August of 2003, APEGA withdrew Mr. Mihaly's application as he did not adhere to the deadline for writing the three confirmatory examinations [4]. Mr. Mihaly complained about APEGA not recognizing his academic qualifications to APEGA's Director of Professional Practice [3]. In October of 2006, APEGA reactivated Mr. Mihaly's application for registration upon Mr. Mihaly's request [4]. Given the passage of time since Mr. Mihaly's first application, APEGA required Mr. Mihaly to update his resume and list of references, and Mr. Mihaly provided this information in November of 2006 [4].

In August of 2007, APEGA re-evaluated Mr. Mihaly's application and decided Mr. Mihaly still had to complete the three more confirmatory examinations along with a course or equivalent exam in Engineering Economics, or the Fundamentals of Engineering Examination (FE) [3]. APEGA also required Mr. Mihaly to complete one-year acceptable D level Canadian engineering experience after APEGA assessed Mr. Mihaly did not have that experience, due to his work positions having not reached D level [4]. Mr. Mihaly did not write the examinations required by APEGA [4].

3.2 Alberta Human Rights Commission Ruling

3.2.1 Mr. Mihaly's Complaint

In August of 2008, Mr. Mihaly filed a complaint under ss. 4, 7, and 9 of Alberta Human Rights Act, RSA 2000, c A-25.5 (AHRA) with the Alberta Human Rights Commission (AHRC) [3]. Mr. Mihaly complained that APEGA discriminated against him individually by requiring him to write the three confirmatory exams and the Fundamentals of Engineering Examination because he

had foreign credentials [3]. The AHRC proceeded the case under sections 4 and 9 of AHRA [3]. The Tribunal found that Mr. Mihaly's case is a prima facie case where APEGA, as an occupational association that provides services and membership, discriminated against Mr. Mihaly based on place of origin [3].

3.2.2 AHRC Decision

On February 6th of 2014, the Tribunal concluded that APEGA's assessment of Mr. Mihaly's educational credentials, with the Examination Standard and Experience Standard of APEGA and without providing other options or an individualized assessment, was an act of discrimination against Mr. Mihaly under the AHRA [3].

The Tribunal provided remedies: First, APEGA should make sure its processes do not discriminate [3]. In case Mr. Mihaly wanted to apply for registration as an engineer again, APEGA is ordered to review his application, allow Mr. Mihaly to challenge specific examinations, establish a committee to create an individualized assessment for Mr. Mihaly, provide Mr. Mihaly with resources and a mentor of similar background to guide him, and help Mr. Mihaly find community resources that would help his fluency with English [3]. Second, Mr. Mihaly received \$10,000 in general damages considering the injury to Mr. Mihaly's dignity, the impact of challenges of Mr. Mihaly's application process had on him and his family, and the lack of meaningful assistance from APEGA to help Mr. Mihaly meet their expectations [3]. The Tribunal did not find a causal relationship between the discrimination and Mr. Mihaly's possible loss of wages, therefore there was no compensation lost wages [3].

3.3 The Court of Queen's Bench Ruling

3.3.1 Appeal from APEGA and Cross-Appeal by Mr. Mihaly

On November 20, 2014, APEGA filed an appeal and Mr. Mihaly filed a response statement [4]. Later in the same month, the Law Society of Alberta filed as Intervener, and the Alberta Human Rights Tribunal filed limited submissions about the standard of review [4].

In this appeal, APEGA wanted a "reversal of the decision of the Human Rights Tribunal", and Mr. Mihaly's cross-appeal was for remedy of his losses in income by receiving either \$1,000,000 and registration as a professional engineer with APEGA, or \$2,000,000 without registration [4]. The appeal hearing was on July 23rd and 24th of 2015 [4].

3.3.2 The Court of Queen's Bench Decision

APEGA won the appeal – the Court of Queen's Bench overturned the decision of the Human Rights Tribunal, and Mr. Mihaly's cross-appeal was dismissed as discrimination was not found under the AHRA [4].

4 The Court of Queen's Bench Decision

On November 20, 2014, APEGA filed an appeal to overturn the decision of the Alberta Human Rights Tribunal. On the same day, Mr. Mihaly filed a cross-appeal on the Tribunal's refusal of compensation for his losses of income [4].

4.1 APEGA's Appeal

APEGA's appeal focuses on the following issues [4]:

- "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 face 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 and unreasonable? "

Of these four issues, the Court of Queen's Bench decision concluded that in both the first and the second issues APEGA has not established that the Tribunal breached the rules of fairness, and has not established that the Tribunal lacked jurisdiction [4].

4.2 Prima Facie Discrimination

The establishment of a prima facie case of discrimination under the Moore test requires the complainants to show "that they are 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" [4]. In the AHRC decision, the Tribunal decided that "place of origin" was the grounds of discrimination for Mr. Mihaly, that the adverse impacts were from APEGA's required examinations [4]. The Court of Queen's Bench also concluded that Mr. Mihaly's place of origin was linked to the adverse impact on him as Mr. Mihaly could not avoid writing the confirmatory examinations for the FE Exam unless he left his place of origin for education [4]. However, the Court of Queen's Bench also found that the requirements to pass the NPPE were not discriminatory, as all applicants had to write it, and that APEGA's requirement of four years of experience for professional engineers (with one year in Canada) was not discriminatory based on Mr. Mihaly's origin [4].

Ultimately, the Court of the Queen's Bench concluded that the Tribunal did not apply the Moore test properly to the NPPE and Canadian experience requirements, and therefore the Tribunal's finding of prima facie discrimination in relation to these two points were unreasonable [4].

4.3 Assessment of APEGA's Registration Requirements

Previously, the Tribunal had found that APEGA "has 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.”, and the Queen’s Bench Court agreed that “the standards applied by APEGA are adopted for safety and competency reasons” [4].

However, the Tribunal also found that “APEGA did not reasonably accommodate Mr. Mihaly”, regarding the APEGA requirements of writing three confirmatory exams, the FE Exam, the NPPE, and of completing one year of Canadian experience [4]. The Tribunal had interpreted s 8 of the Engineering and Geoscience Professions General Regulation (EGPR) to mean that Mr. Mihaly should not have needed the confirmatory exams or the FE Exam, and instead only exams to correct perceived academic deficiencies [4]. However, APEGA assigns confirmatory examinations or the FE Exam when it lacks reliable evidence about the credibility of the engineering programs and thus needs to affirm competence of the graduates through other means [4]. The APEGA’s policy of appointing applicants with unknown competency to write confirmatory examinations are consistent with the EGPR and APEGA’s own policy of making sure professional engineers are competent [4]. The Court of Queen’s Bench judged the Tribunal’s ruling based on the EGPR unreasonable and unsupported [4].

The Tribunal also critiqued the Foreign Degree (FD) List, however, the Queen’s Bench argues that the FD list allowed Mr. Mihaly to write less confirmatory exams as his Degree was on the list, allowing him to write two less confirmatory exams [4]. The Tribunal suggestion for APEGA to become more proactive and negotiate more agreements with foreign institutions has also been refuted by the Queen’s Bench, because APEGA has the FD List and already works with the Canadian Energy Accreditation Board and several other national and international organizations, and because further endeavors may be beyond APEGA’s capabilities [4]. The Queen’s Bench also affirmed that “there was no evidence that internationally educated graduates with entry level competence would have any difficulty passing the FE Exam”, refuting the Tribunal’s claim that the FE Exam is “unreasonable because it is standardized” [4]. Ultimately, these exams were not unreasonable as they were developed to ensure public safety, thus it is important to provide “an objective assessment of the qualifications” of professional engineers [4].

4.4 The Court of Queen’s Bench Ruling

The Court of Queen’s Bench concluded that the Tribunal’s directions to APEGA is unreasonable and does not consider that in making these accommodations, APEGA would be “fundamentally altering its standards and being required to act outside of its regulatory role” [4]. Therefore, the decision of the Human Rights Tribunal was reversed and APEGA won the appeal [4]. Mr. Mihaly’s cross-appeal was dismissed because the basis for his appeal was *prima facie* discrimination, which was found unproved by the Court of Queen’s Bench [4].

5 Reflection and Opinion

5.1 Opinion on Decisions

This was a very interesting and contemporary case that brought forth the legal legitimacy, and legal structure of the entities that regulate the practice of Engineering in Alberta.

5.1.1 Do you agree with Alberta Human Rights Commission Decision

We agree that in effect academic standards are inherently a type of discrimination, but the rigidity of this discrimination as imposed by APEGA is in the public's interest.

Oftentimes cases may have merit but must be dismissed as the adjoining recommendations may impose unacceptable precedence. We think that the precedence of the AHRC's decision in *Mihaly v APEGA* would impose unacceptable burdens in re regulation of the engineering profession.

5.1.2 Do you agree with The Court of Queen's Bench Decision

We agree that APEGA's expectation in the required academic tests is reasonable, as these tests were on the basis of this profession.

We indeed agree that demands to APEGA such as providing a mentor, and build a committee to review this particular case goes outside the scope of the organization.

In fact we applaud and would like to highlight the court's statement in line 147 page 25 saying that AHRC's demands would fundamentally alter APEGA according to its mandate.

5.1.3 Do you agree with Alberta Court of Appeal Decision

The Alberta Court of Appeals decision only provides an affirmation of CQBA's decision due to what appears to be a filing mistake or lack of responding evidence by the appellant regarding his appeal to the CQBA [10]. The court found that the restoration of his appeal was not met and the appeal case was dismissed. The court finally restates the findings by the CQBA and tests the case.

5.2 Opinion on Accommodation of Foreign Trained Engineers and Scientists

This is a tricky question, APEGA already accommodates ITGs through international MRAs, alleviation based on FD List reviews, program review at the request of the foreign institution, and a rigorous course by course requirement.

Now, if the question was in regards to the nuances of how APEGA can better accommodate IEGs in attaining their license we humbly hold the following opinions:

- In any decision undertaken the public's interests must remain paramount
- Canada has a large untapped resource of knowledge and experience in unlicensed IEGs
- The accreditation process of APEGA can only be diminished minimal levels as to maintain the high standards mandated by CEAB
- APEGA should hold a more "open door" policy where applicants can communicate more quickly and openly
- APEGA should make mentorship available for IEGs and persons with defensible application cases in order to facilitate their professional experience
- APEGA should direct IEGs and persons with defensible application cases to ESL programs focused in engineering vocabulary

5.3 Closing Remarks:

As with most negotiation both parties have legitimate reasons for bringing forth their cases. We found some of AHRC's requests to be reasonable such as APEGA should offer mentoring, be more open and communicative, and direct applicants to applicable ESL services. The former would be true in an ideal system. But since we have a common-law system of jurisprudence,

the precedence of a professional public-safety-sensitive regulating body being overruled in critical matters such as licensing, by an extraneous commission is unacceptable. Engineering, a pillar of Canadian society, should remain self-regulating. We fully agree with the court's decision in striking down AHRC's verdict on *Mihaly v. APEGA*.

6 References

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