

APEGA V MIHALY CASE STUDY

ENGG 513

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I. INTRODUCTION

The overall purpose of this report is to gain greater insight into the requirements to become registered as a professional engineer with the Association of Professional Engineers and Geoscientists of Alberta (APEGA), APEGA's regulatory process, and the legal and quasi-legal environment in which APEGA operates. Specifically, this report will explore the case based on an appeal by APEGA against the decision of the Alberta Human Rights Commission (AHRC), issued on February 6, 2014 [1]. Mr. Ladislav Mihaly (Mihaly) had complained to the AHRC that he had been discriminated against by APEGA in relation to his application to be registered as a professional engineer. The AHRC concluded that APEGA discriminated against Mihaly on the grounds of his 'place of origin', by refusing to recognize his education as equivalent to an engineering degree acquired from an accredited Canadian University. Furthermore, AHRC found that APEGA had discriminated against Mihaly by requiring him to write examinations to confirm his academic credentials. This report will describe the stakeholders associated with this case, the background of the case and case summary, the ruling of The Court of Queen's Bench, and a section for a discussion on the appeal of the decision made by the Court of Queen's Bench to the Alberta Court of Appeal.

II. STAKEHOLDERS

APEGA

APEGA regulates the practice of engineering and geoscience in Alberta according to the Engineering and Geoscience Professions Act (EGPA), and the Engineering and Geoscience Professions General Regulation (EGPR) [1][2][3]. Anyone who wishes to practice engineering in Alberta must be approved for registration as a Professional Engineer, licensee, permit holder or certificate holder according to procedure contained in the EGPA [2].

The Court of Queen's Bench

It is the responsibility, purpose and constitutional obligation of the Court of Queen's Bench of Alberta to administer justice and the rule of law in the Province of Alberta in criminal matters, civil proceedings (including family and surrogate proceedings), and in the judicial review of government action in Alberta. As a court of inherent jurisdiction, the Court of Queen's Bench of Alberta functions as the primary forum for judicial review of government action in Alberta, and hears statutory appeals from the decisions of certain provincial administrative tribunals [4].

The Alberta Human Rights Commission

The Alberta Human Rights Act [5] establishes the Alberta Human Rights Commission to carry out functions under the act. The government of Alberta created the independent commission with a twofold mandate: to foster equality and to reduce discrimination. It fulfills this mandate through public education and community initiatives, through the resolution and settlement of complaints of discrimination, and through human rights tribunal and court hearings [6].

Mr. Ladislav Mihaly

Mihaly was born in Czechoslovakia and holds two Masters Degrees: one from the Slovak Technical University in Bratislava and the other from the Institute of Chemical Technology in Prague. Mihaly immigrated to Canada and first applied to APEGA for registration as a Professional Engineer in 1999. Mihaly later filed a complaint with the AHRC in August 2008, alleging that he was discriminated against by APEGA when he was denied registration as a Professional Engineer. His complaint was about whether the requirements imposed upon him by APEGA for registration as a Professional Engineer are contrary to the Alberta Human Rights Act [7] [5].

Other Professional Regulatory Bodies

Standardized tests are widely used by other professional regulatory bodies to provide an objective assessment of qualifications, skills, knowledge and other matters. Requiring applicants to demonstrate aptitude through standardized tests helps ensure that the process of determining fluency is independent, objective, transparent, fair, and impartial. The outcome of this case largely affects the basis and structure of all other regulatory bodies in Alberta and Canada as a whole by affirming or undermining current practices.

Internationally Educated Professionals

This group encompasses all other professionals that can apply for accreditation in regulatory bodies in Alberta and Canada. The outcome of this case affects the perception of regulatory bodies to parties outside of Canada and to new internationally educated immigrant professionals.

Albertan and Canadian Public

The Albertan public as well as the Canadian public are affected by this case in the understanding of how regulatory associations ensure reasonable access and maintain standards for public safety. The public is interested in this case as it can be interpreted as a potential scenario where regulatory bodies prioritize the needs of an individual applicant was over the regulator's need to protect the public. This case also feeds into the public perception of regulatory bodies. That is to say, it demonstrates whether regulatory bodies are welcoming towards applicants from around the world with fair, cost effective and accessible assessment processes, while also ensuring a certain level of rigorousness that ensures the applicant possesses the entry level competencies required to practice in our province. This ensures the statutory obligations of protecting the public are upheld.

III. BACKGROUND

Mihaly first applied to APEGA for registration as a Professional Engineer in May of 1999 after immigrating to Canada. His application included the names of three references who were to be sent questionnaires by APEGA for completion. APEGA received his application in May of 1999 and requested his transcripts from the academic institutions that he had attended as well as a Landed Immigration form. He was advised by APEGA that he would be required to write the

National Professional Practice Exam (NPPE). This exam is not technical, but tests knowledge of law, ethics, professionalism, professional practice, professional responsibility, and understanding of the governing legislation [1][8].

In January 2000, the Board of Examiners at APEGA reviewed Mihaly's application and concluded that his work experience was too narrow in coverage and that he had not spent enough time working under the references that he had provided. APEGA advised him in February 2000 that he must complete three confirmatory examinations as well as take a course, or pass an equivalent exam in engineering economics by May 2001. This requirement was in addition to the NPPE. They found that the chemical engineering degree from Bratislava did not meet the APEGA academic requirements, but the program was included on the Council of Professional Engineers Foreign Degree List. In their communications they also noted that there are no Mutual Recognition Agreements (MRAs) in place between Canada and Mihaly's former country. In this same letter, they informed Mihaly that he had failed the NPPE, which he had taken in January 2000. Mihaly later applied to write the NPPE again in October 2000, but did not write the exam. In June 2001, APEGA notified Mihaly that it had withdrawn his application since he had not passed the required confirmatory exams [1][7].

In May 2002, Mihaly submitted an application again and applied to take the NPPE in July 2002. His file was reactivated and APEGA notified Mihaly that he was required to write the same three confirmatory exams by May 2003 and the engineering economics exam by November 2003. In June 2003 Mihaly claimed that he should not have to write any exams, asking for a waiver because he had 12 years of international experience, taught colleagues, and worked at a research institute. APEGA communicated that his education was not recognized and would still need to take the four exams to be accepted. Mihaly was also provided with an appeal form to contest the ruling but did not file an appeal. Mihaly failed the NPPE that he wrote in July 2002. In August 2003, APEGA notified Mihaly that it had withdrawn his application since he had not passed the required confirmatory exams [1][7].

In October 2006, Mihaly asked APEGA to reactivate his application again. APEGA requested Mihaly to present an updated resume and a list of updated references. In November 2006, Mihaly submitted the name of a professional engineer he had worked for in Calgary, the name of a gas company owner, and the name of a co-worker. In August 2007, the Board determined that Mihaly had to complete the three confirmatory exams plus a course in engineering economics or the Fundamentals of Engineering Examination (FEE). The Board also determined that Mihaly did not acquire the one-year North American professional engineering experience in the position where he worked because it was at an insufficient level. APEGA advised that he was required to obtain one year of acceptable D level North American engineering experience in addition to the exams. Mihaly did not write the required exams, and in August 2008, filed a complaint with the AHRC [1][7].

The AHRC had found that APEGA had made discriminatory assumptions by waiving exam requirements for international applicants from foreign countries with which APEGA had MRAs, but not waiving exam requirements for international applicants from countries without an MRA. The decision was that APEGA had discriminated against Mihaly on the grounds of his place of

origin in relation to his application to be registered as a professional engineer as a result of APEGA's assessment of his educational credentials. APEGA appealed the AHRC's decision [1].

Madam Justice Ross at the Court of the Queen's Bench ruled that the decision made by the AHRC was unreasonable and that it had to be reversed. She found that portions of the AHRC's findings of discrimination were based on the application of the wrong legal test and a lack of evidence to support the finding. Mihaly later appealed this decision to The Alberta Court of Appeal [1].

The Alberta Court of Appeal dropped the appeal in June 2016 when Mihaly failed to follow up. In January 2017, the Alberta Court of Appeal officially dismissed Mihaly's application to appeal the Court of Queen's Bench ruling that reversed the AHRC tribunal decision against APEGA [9].

IV. THE COURT OF QUEEN'S BENCH DECISION

Justice Ross broke down the issues in the case as follows:

Procedural fairness: Did the AHRC breach the rules of procedural fairness when they decided upon issues that were not dealt with between APEGA and Mihaly [1]?

Jurisdiction: Did the AHRC err when they assumed the right to determine whether discrimination based on the place of postsecondary education constitutes discrimination based on place of origin [1]?

Prima facie discrimination: Did the AHRC rely on the correct legal test, and reasonably apply that test, to determine whether Mihaly had demonstrated prima facie discrimination [1]?

Justification: Was the AHRT reasonable in concluding the APEGA registration requirements were unreasonable (and thus not justified) [1] [10]?

For the first point Justice Ross concluded that the AHRC did not breach the rules of procedural fairness when it did not ask for submissions on its interpretation of the EGPR [3].

For the second point, Justice Ross found that there was a sufficient connection between Mihaly's place of education and his place of origin. Because of this, Mihaly's place of education was a protected characteristic and the AHRC had jurisdiction to consider the complaint [10].

For the third point, Justice Ross found that that imposing the same entry-level requirements for international applicants as Canadian applicants cannot be considered prima facie discrimination. Though Mihaly had failed the NPPE three times, there was no evidence to show that was because of his place of origin, on the extension that there was no evidence of adverse impact on other international applicants [1]. Justice Ross also found that when Mihaly complained of difficulty finding work, he did not cite his place of origin as the reason.

For the fourth point, Justice Ross concludes that “the possession of entry level competence is reasonably necessary to safe practice as a professional engineer” [1]. Meaning that APEGA was justifiably within the bounds of its role as a regulatory body.

Justice Ross found that the AHRC “made findings of fact not supported by the evidence, failed to take into account relevant evidence, and made unreasonable interpretations of the evidence” [1]. She went on to find that portions of the AHRC’s findings of discrimination were based on the application of the wrong legal test and a lack of evidence to support the finding. Justice Ross held that the requirement to write confirmatory examinations was reasonable and justifiable for a regulatory body [11]. She concluded that APEGA’s system of assigning confirmatory examinations is consistent with its role under the legislation and the statutory objective of ensuring that engineers have entry -level competence to protect the public. Justice Ross also concluded that the AHRC’s decision on accommodation was “rife with logical errors”, factual findings not supported by the evidence, and failed to take into account relevant considerations [12].

V. REFLECTION AND OPINION

I disagree with the decision of the AHRC and consequently agree with the ruling of the Court of Queen’s Bench in that the argument for prima facie discrimination was broken down into its subcomponents with the Moore test and was logically checked at every level. The test has two stages. The first identifies if prima facie discrimination is present and the second is if the discrimination is justified [11]. The test for prima facie discrimination is 1) whether the complainant has a characteristic that is protected from discrimination; 2) the complainant experiences an adverse impact; and 3) the protected characteristic was a factor in the adverse impact [11]. The test for justification requires the defendant to prove that 1) it adopted the standard for a purpose that is rationally connected to the function performed; 2) the standard was adopted in good faith; and 3) the standard was reasonably necessary to accomplish the purpose [11]. Justice Ross found that there were reasonable grounds for prima facie discrimination due to the adverse impact of the existence of the confirmatory exams on certain international applicants (there was sufficient connection between Mihaly’s place of education and his place of origin to confirm that he had a characteristic that is protected from discrimination). However, the court was able to reject the notion that the requirement rested on a discriminatory assumption that international applicants had inferior academic qualifications. The requirement arises because “APEGA does not have sufficient knowledge of the engineering program to make an assessment” [11].

Once the issue of prima facie discrimination was put aside the only remaining decision was whether APEGA was unjustified in its practices for imposing extra testing for international professionals whose credentials were unrecognized. There is no way for APEGA to know how qualified a person is if they have no way of systematically verifying the depth and breadth of the content covered and the quality of instruction in a given institution as they do for accredited Canadian university programs. Possession of entry level engineering competence is reasonably necessary to safe practice as a professional engineer. So, it is reasonable to expect APEGA to ask for the completion of the additional confirmatory exams. Regulatory bodies should not be expected to change their directives in a fundamental way, or they would negatively impact the reliability

and credibility of all the self-regulating institutions we have in Canada, ultimately putting the safety of the public at risk.

I think that APEGA already accommodates foreign-trained engineers as much as they can as a regulatory body. As mentioned in the case [1], it is completely unreasonable to impose that APEGA should change their accommodation process because of the impact it would have on the association as a whole. It would force APEGA and other regulatory bodies outside of its regulatory role [11]. As shown by the Mihaly case, it is the responsibility of the applicant to work cooperatively with the regulatory bodies in the search for possible accommodations. APEGA and other regulatory bodies have a distinct role in maintaining the balance between both international applicants' interest in accessing the profession and the regulator's interest in protecting the public. This method the regulators use must be balanced in determining a fair, transparent and non-discriminatory regime for international applicants [11].

V. REFERENCES

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