

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

Mihaly Case Study

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Introduction

This is a case study report based on the Court of Queen's Bench of Alberta judgement which involves the Association of Professional Engineers and Geoscientists (APEGA), the Alberta Human rights Commission and Mr. Ladislav Mihaly. The purpose of this report is to explore the requirements of becoming a registered engineer, gain a deeper insight of APEGA's regulatory process and develop a greater understanding for the legal environment in which APEGA operates [1]. These ideas are explored through the case of Ladislav Mihaly seeking to register as a professional engineer with APEGA, while failing to meet the requirements set out by the association, and the involvement of the Alberta Human Rights Commission and the Court of Queen's Bench to resolve the issue.

Stakeholders

APEGA: APEGA regulates the practice of engineering and geoscience in Alberta [2] and was found guilty by the Humans Rights Commission on accounts of discriminating against Mr. Mihaly based on his place of origin when he applied for registration as a Professional Engineer [2], [3]. In response, APEGA submitted an appeal to The Court of Queen's Bench to dispute the decision made by the Human Rights Commission over Mr.Mihaly's complaint [2].

The Court of Queen's Bench: The court holds the power to appeal the decision made by the human rights commission; they have the power to confirm, reverse or vary the order of the human rights tribunal decision [2]. APEGA approached The Court of Queen's Bench after believing they were wrongfully accused of discrimination against Mr.Mihaly in his complaint to the Alberta Human Rights Commission [2].

The Alberta Human Rights Commission: The Alberta Human Rights Commission has a twofold mandate to foster equality and to reduce discrimination [4]. Mr.Mihaly complained to the commission that APEGA discriminated against him by not allowing him to register as a professional engineer based on his country of origin [2], [3]. The commission ruled that APEGA was guilty of discriminating against him and his place of origin by refusing to recognize his education as an equivalent accredited Canadian University engineering degree and by requiring him to write additional examinations to confirm his academic credentials [2], [3].

Mr. Ladislav Mihaly: Mr.Mihaly was born in Czechoslovakia and obtained two Masters Degrees from there [3]. In 1999 he applied to become a professional engineer with APEGA [2], [3]. Mr. Mihaly was required to write confirmatory exams to become an engineer by APEGA since his degree was on the Foreign Degrees list as set out by Canadian Council of Professional Engineers [3]. Mr. Mihaly filed a complaint to the Alberta Human Rights Commission arguing that he was being discriminated against by APEGA [2], [3].

Dean David Lynch: Dean Lynch was Dean of the Faculty of Engineering at the University of Alberta and also a member of the Canadian Engineering Accreditation Board (CEAB) [2], [3]. The CEAB assesses engineering programs within and outside Canada [2], [3]. Dean

Lynch was called upon as a witness on behalf of APEGA to provide testimony on the process of international agreements and the evaluation of engineers educated outside Canada [3].

The Alberta Court of Appeal: Mr. Mihaly filed an appeal with the Alberta Court of Appeal following the decision made by The Court of Queen's Bench [5]. The Alberta Court of Appeal decided to dismiss Mr. Mihaly's appeal [5]. The Alberta Court of Appeal hears appeals from administrative and board tribunals and reviews the record to determine whether errors of law or fact were made in a decision [6].

Dr. Gary Faulkner: Dr. Faulkner was on the APEGA board of examiners [3] and the second witness called upon on behalf of APEGA [2], [3]. As a member of the committee, he was one of the individuals that reviewed Mr. Mihaly's application to APEGA to become a professional engineer [3]. Dr. Faulkner testified that the standard confirmatory exams were assigned to Mr. Mihaly as the board believed the type of experience Mr. Mihaly possessed had not increased in responsibility and complexity [3].

Background

In summary, Mr. Mihaly first applied to APEGA for registration as a Professional Engineer in May 1999 [2], [3]. On February 11, 2000, the Board of Examiners from APEGA upon considering his application, decided that he must complete three confirmatory exams and take a course or pass an equivalent exam in Engineering Economics by May 2001, in addition to passing the NPPE [2], [3]. Mr. Mihaly failed his first attempt at the NPPE on January 17, 2000 and did not show up to his second attempt on October 16, 2000 [2], [3]. On June 29, 2001, APEGA advised Mr. Mihaly that his application for registration had been withdrawn since he had failed to write the required confirmatory exams by May 2001 [2], [3]. There were two reactivations to Mr. Mihaly's applications for registration. In the first reactivation, Mr. Mihaly was once again told to complete three confirmatory examinations and the Engineering Economics Exam in addition to passing the NPPE, similarly to before [2], [3]. Mr. Mihaly had a telephone conversation with APEGA's Director of Registration, Mr. Tokarik, which suggested that Mr. Mihaly was asking for a waiver from these requirements based on his 10 plus years of experience [3]. Mr. Tokarik sent out a Reconsideration and Appeal Sheet to Mr. Mihaly, however the appeal was never filed [3]. Mr. Mihaly failed the NPPE for the second time which he wrote on July 15, 2002 and on August 1, 2003, APEGA again withdrew his file because the confirmatory exams were not completed within the period requested by APEGA [2], [3]. On October 3, 2006, Mr. Mihaly asked APEGA to reactivate his application for the second time. APEGA requested from him an updated resume and list of updated references given the passage of time which had passed since the last application [2], [3]. The Board of Examiners also reconsidered his application and again gave Mr. Mihaly the same requirements as before or the option to write the Fundamentals of Engineering Examination (FE) [2], [3]. They also determined that Mr. Mihaly's work experience in Canada was not applicable to the requirements as it was not D level Canadian engineering experience [2], [3]. On August 5, 2008, Mr. Mihaly filed a complaint with the Alberta Human Rights Commission [2], [3]. The Alberta Human Rights Commission ruled that Mr. Mihaly succeeded in establishing that the standards used by

APEGA to assess his educational credentials constituted discrimination which cannot be justified under the Alberta Human Rights Act (AHRA) [2], [3]. The commission acknowledged that the APEGA requirements aid in the familiarization about Canadian codes for foreign engineers, however states that APEGA does not take into consideration the challenges foreign professionals experience when looking for employment and cannot continue to have a hands off approach towards these individuals who are seeking employment in engineering [3].

APEGA was ordered to [2], [3]:

- a) Review Mr. Mihaly's transcripts and experience in direct consultation with his post-secondary institutions and references to identify exemptions for Mr. Mihaly.
- b) Grant Mr. Mihaly the option to challenge examinations in areas where he was not granted an exemption.
- c) Establish a committee to individually assess the qualifications of Mr. Mihaly to correct any perceived academic deficiencies.
- d) Use its best efforts to match Mr. Mihaly with a mentor with similar background for guidance.
- e) Direct Mr. Mihaly to resources which would allow him to network with other foreign engineers.
- f) Direct Mr. Mihaly to assist him in increasing his fluency in the English Language.

Mr. Mihaly was awarded \$10,000 for general damages however was not awarded lost wages [2], [3]. Following this decision, APEGA approached the Court of Queen's Bench to file an appeal and Mr. Mihaly attempted to cross-appeal the Commission's refusal to award him damages for loss of income and sought an award of \$1,000,000 and registration with APEGA or alternatively, \$2,000,000 if not registered as a professional engineer with APEGA [2]. The Court of Queen's Bench ruled to reverse the decision made by the commission and that there was no need, in the circumstances, to remit the matter back to the commission [2]. Mr. Mihaly's cross-appeal was found to relate to remedy only, and the cross-appeal was dismissed [2]. Following the decision by the Court of Queen's Bench, Mr. Mihaly attempted to appeal it with the Alberta Court of Appeal [5]. Mr. Mihaly filed his appeal but did nothing further to perfect the appeal and the appeal was struck off for failure to file the appeal record [5]. Mr. Mihaly applied to restore this appeal however it was deemed that Mr. Mihaly failed to comply with the criteria for restoring an appeal and the application was dismissed [5].

The Court of Queen's Bench Decision

The appeal hearing on behalf of APEGA versus Alberta Human Rights Commission's decision began on July 23, 2015. The Court of Queen's Bench of Alberta's decision by J.M. Ross [2] states that APEGA argued the following issues; "procedural fairness when the tribunal raised issues that were not raised by either parties (Mr. Mihaly and APEGA), jurisdiction on the matter of discrimination based on where a person receives their education constitutes discrimination based on the person's place of origin, Prima Facie

discrimination referring to the correct legal tests being conducted and justification on whether the tribunal's decision was justified " [2].

The Court of Queen's Bench decided that APEGA's claim that the tribunal followed unfair procedure by not allowing APEGA to respond to "any new ground of decisions that arise in a tribunal's consultations or considerations" [2] were not justified. The court claims that the issues presented during the hearing and the tribunal's consultations or considerations were identical. This allowed APEGA to have an opportunity to address all of the evidence and submissions that were made.

The Court of Queen's Bench decided that APEGA's claim against discrimination lacked evidence and thus was not justified. APEGA's claim was that the tribunal had no jurisdiction over protecting against discrimination considering "place of origin of academic qualifications" since it's not mentioned in the AHRA [2]. The court argues that discrimination is not directly limited to rules or practices as set out in the AHRA.

APEGA argued to the Court of Queen's Bench that the tribunal's decision that APEGA was discriminating against Mr.Mihaly by having him write the confirmatory exams based on the "Moore Test" [2] was unreasonable. The court found that the tribunal failed to apply the Moore test in relation to the NPPE and Canadian experience requirements. The absence of these considerations from the tribunal's application of the Moore Test in this case renders it unreasonable. The court decided that the tribunal was unreasonable in their decision that APEGA was discriminating against Mr.Mihaly [2].

Finally the justification on the tribunal's conclusion that Mr.Mihaly was facing discrimination with regards to APEGA's requirements that he complete confirmatory examinations or the FE exams was unreasonable according to the Court of Queen's Bench. The court argues that APEGA makes it clear that the confirmatory exams are provided as an objective assessment of the qualifications and knowledge of a competent engineer.

The final decision of the Court of Queen's Bench was to reverse the tribunal's decision [2] of finding APEGA guilty of discriminating against Mr.Mihaly.

Reflection and Opinion

We agree with the decisions of the Court of the Queen's Bench and the Alberta Court of Appeal and hence, do not agree with the decisions made by the Alberta Human Rights Commission. The requirements (three confirmatory examinations and a course in Engineering Economics or a FE examination) given out to Mr. Mihaly for professional registration in addition to passing the NPPE [2], [3] were a fair way to assess Mr. Mihaly's ability to professionally practice engineering in Alberta.

These requirements are a standard given to all applicants on the foreign degree list [2], [3], and therefore we feel Mr. Mihaly's accusations of discrimination were wrong and unjust. Mr. Mihaly never sat for the confirmatory examinations given to him because he felt he was being treated differently by APEGA than engineers from other countries like France, UK, Ireland, etc.[3]. Mr. Mihaly was treated differently from other countries but that does not necessarily constitute discrimination.

The CEAB assesses engineering programs outside Canada to determine whether they have equivalent outcomes in their educational processes as compared to Canada [2], [3]. Czechoslovakia did not possess an engineering program that met these CEAB requirements and hence are not on a Mutual Recognition Agreement (MRA) with Canada. If France, UK, Ireland, etc. were similarly deemed by the CEAB to not have equivalent outcomes in their educational processes in engineering, then they would not have MRAs with Canada either. Mr. Mihaly placed an emphasis on discrimination based on place of origin for education when he really should have reflected more on the differences on various engineering programs and the unique outcomes that result from each program. Ultimately not every international engineering program will be able to meet the requirements set out by the CEAB and Mr. Mihaly along with other foreign engineers striving to work in Canada should be understanding of that fact.

Canada is one of the countries in the world with a closed licensing law on the practice of engineering [7]. This means that the right to practice and the right to the title of a Professional Engineer is limited [7]. By doing so, we feel that this makes Canada a much safer place for the public since associations like APEGA are in place to regulate engineering and to set high standards of practice. This is important because the title of Engineer may be loosely applied in other countries [7] so the closed licensing law forces foreign individuals like Mr. Mihaly to pass tests to confirm their competency and qualifications.

In our opinion, APEGA already accommodates foreign-trained engineers and geoscientists to an appropriate extent that further accommodations would not be justified. The standards put into place for foreign-trained engineers are a fair and accurate way to assess their abilities to be a skilled and qualified engineer or geoscientist to serve the public in Canada. Foreign-trained engineers and geoscientists that are deemed to have experience or academic deficiencies are directed to correct those deficiencies in reasonable methods like taking a course or passing an exam instead of having to do things like retaking a Bachelor's degree of Engineering in Canada. However, such accommodations like the ones directed by the Alberta Human Rights Commission to APEGA in the Mihaly case ("Use its best efforts to match Mr. Mihaly with a Mentor who has a similar background and who can provide him the necessary guidance to approach his challenges as an engineer and gradually integrate himself into the profession, direct Mr. Mihaly to resources within the profession which will

allow him to network with other foreign engineering graduates facing similar challenges; and direct Mr. Mihaly to community resources which would assist him to increase his fluency and facility in the use of the English Language”) require too much additional resources if done for every foreign-trained engineer and would be both costly and inefficient [2], [3]. In addition, we have to keep in mind that APEGA is a regulatory body and forms of accommodations like this would require them to act outside of their regulatory roles. As J.M. Ross says in her justification of her court decision, employers do not have a duty to change working conditions in a fundamental way and even more so, regulatory bodies should not be expected to change their mandate in a fundamental way [3].

In conclusion, we do agree with the decisions of the Court of Queen’s Bench and the Alberta Court of Appeal and do not believe that APEGA should further accommodate foreign-trained engineers and geoscientists.

References

- [1] D.Onen, “ENGG 513 - Winter 2018 - Mihaly Report Grading Guide”, University of Calgary, 2018
- [2] J. M. ROSS, “Association of Professional and Geoscientists of Alberta V Mihaly,” *APEGA*, 26-Jan-2016. [Online]. Available: <http://www.apega.ca/assets/PDFs/mihaly-decision.pdf>. [Accessed: 16-Feb-2018].
- [3] M. Jiwaji, “Mihaly v. The Association of Professional Engineers, Geologists and Geophysicists of Alberta,” *The Canadian Legal Information Institute*, 06-Feb-2014. [Online]. Available: <https://www.canlii.org/en/ab/abhrc/doc/2014/2014ahrc1/2014ahrc1.html?search>. [Accessed: 16-Feb-2018].
- [4] “About the Commission,” *Alberta Human Rights Commission*, 24-Oct-2012. [Online]. Available: <https://www.albertahumanrights.ab.ca/about/Pages/about.aspx>. [Accessed: 16-Feb-2018].

[5] F. Slatter, "Mihaly V Association of Professional Engineers and Geoscientists of Alberta," *APEGA*, 12-Jan-2017. [Online]. Available: <https://www.apega.ca/assets/news-releases/2017-milhaly-court-decision.pdf>. [Accessed: 16-Feb-2018].

[6] "ROLE AND OPERATION OF THE COURT OF APPEAL OF ALBERTA," *Court of Appeal of Alberta*. [Online]. Available: <https://albertacourts.ca/ca/about/role-and-operation>. [Accessed: 16-Feb-2018].

[7] G. C. Andrews, *Canadian Professional Engineering and Geoscience Practice and Ethics 5th edition*. Nelson, 2014.